



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1102

Case No. 1183: HIJAZ

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestinian Refugees in the
Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline Scott;

Whereas, on 8 December 2000, Kazim Hijaz, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 April 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"Section II

Pleas

4. A) I would ... appreciate if the Tribunal could call the following witnesses
...

B) I would like to file an appeal against the following administrative decisions and discriminatory treatment exercised against me:

- 1) Terminating my service with the Agency prior to the expiry of my fixed-term appointment ...
- 2) [Refusing to approve] my request to release me on secondment to serve with the International Criminal Tribunal for Rwanda (ICTR), Arusha, Tanzania, and [by] considering that request a resignation;
...
- 4) Deletion of my post without following the Agency's policies ... [while] a similar post ha[d] been established in the Department;
- 5) ...
...

b) To consider the *approved* leave by the Administration to go to serve with ICTR ... abandonment of post ...
...

- 8) Disregarding and ignoring the [Joint Appeals] Board (JAB)'s findings about the "irregularities" of the Agency Administration's decisions ... [such as]:

- a) Considering my request for secondment, as a resignation ...
- b) [Failure by the] Administration [to declare the Applicant] provisionally redundant ...
...

- C) I would like to request the Tribunal to recommend the following:

- a) To reverse the Administration's decision to terminate my services prior to the expiry of my fixed-term appointment ...
- b) To reverse the Administration's initial decision to separate my service with the Agency on resignation ...
- c) To reverse the Agency's final decision to separate my service with it on abandonment of post ...
- d) To approve my request to release me on a secondment to serve with ICTR, in Arusha, Tanzania, *to retain my functional title as Personnel Officer*, and not to consider that request as resignation or abandonment of post ...
...

g) To appoint me [to] the newly established post of Personnel Policy Officer, P-3 ... established in the Department ...

...

D) ...

to compensate me ... in [the] amount of US\$ 7,000,000.00 ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 August 2001 and periodically thereafter until 30 June 2002;

Whereas the Respondent filed his Answer on 27 June 2002;

Whereas the Applicant filed Written Observations on 29 April 2003; and, on 25 June, the Respondent submitted comments thereon;

Whereas, on 9 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

On 27 January 1998 the Agency made an offer of appointment to the Applicant for the post of Personnel Officer (I), Grade 16, at the International Personnel Section, Headquarters, Gaza, for a one-year period, with a six-month probationary period. Subject to satisfactory performance, the contract would be extended for another year. The Applicant was also advised that his appointment was subject to the Area Staff Regulations and Rules. On 3 February 1998, the Applicant accepted the offer. The Applicant commenced his employment on 1 March 1998.

On 19 March 1998, the Applicant signed a fixed-term "Category X" letter of appointment, effective 1 March 1998, containing significantly different provisions to those contained in the original offer.

On 12 July 1998, the Applicant was given an overall rating of "*A very good performance*" in the Performance Evaluation Report (PER) for the first five months of his employment.

By facsimile dated 24 July 1998, the Chief, Personnel Section, ICTR, advised the Agency that ICTR would be interested in the Applicant's services on a fixed-term appointment for an initial period of one year, on the understanding that he be released on secondment. On 6 August 1998, the Applicant responded to ICTR, stating that it was not UNRWA's policy to release staff members on secondment, but

that he was "willing to resign" in order to take up an appointment with ICTR. On 27 August 1998, ICTR informed the Chief, Personnel Section, UNRWA, Gaza, that they would like to offer the Applicant an appointment, "based on his willingness to resign his position in UNRWA".

On 10 September 1998, the Commissioner-General approved a recommendation that the vacant P-3 post of Personnel Officer, International Personnel Section, Gaza, be frozen and that an International post of Personnel Assistant at the G-6 level be established instead.

On 20 October 1998, the Applicant wrote to the Deputy Commissioner-General, informing him that, although he had received an offer of employment from ICTR (which had a deadline of 5 November), he would prefer to stay with UNRWA, in a professional post, and requesting his assistance in this regard.

On 14 January 1999, following a proposal to that effect, the Commissioner-General approved the restructuring of the Human Resources Division, resulting, inter-alia, in the abolition of the Applicant's post. In a letter dated 27 January 1999, the Applicant was advised that his fixed-term appointment would not be extended beyond its expiration on 28 February 1999 and he was given 30 days' written notice. On 31 January 1999, the Applicant wrote to the Director of Administration and Finance, Gaza, requesting review of the decision to terminate his services, on the basis that the offer of appointment letter specified in paragraph 3 that, subject to satisfactory service, his appointment would be renewed for another year, and his letter of appointment stated in clause 3 that his appointment would automatically expire on 31 December 1999.

On 4 February 1999, the Applicant advised the Chief, Human Resources Division, that ICTR had again made him an offer of employment. He again requested to be released on secondment and asked for three days annual leave "prior to my departure to ICTR". The Director of Administration and Finance, Gaza, responded to the Applicant on 7 February 1999, accepting the Applicant's "resignation ... as ... requested" but noting that secondment could not be approved because the Applicant's post was being deleted. On 8 February 1999, the Applicant advised the Director of Administration and Finance, Gaza, that he had not submitted a resignation, and requested administrative review of the decisions to a) terminate his appointment and b) deny his request for secondment.

On 12 February 1999, the Applicant joined ICTR. On 15 February 1999, the Director of Administration and Finance, Gaza, wrote to the Applicant, confirming his "acceptance of [his] resignation", noting that this was "definitively in your best interest as compared to abandonment of post".

On 6 April 1999, the Applicant lodged an appeal with the JAB.

On 23 April 1999, the Applicant replied to a request from the Director of Administration and Human Resources, ICTR, dated 21 April, to immediately return documents that came into his possession in connection with his ex-position with UNRWA which were neither copied nor addressed to him personally, stating that he retained only copies, and that he had sent them to the JAB only, as "supporting documentary evidences to my appeal".

On 14 July 1999, the Applicant was offered, in writing, three months' base salary in lieu of provisional redundancy and also a termination indemnity, on the condition that his appeal was withdrawn. The Applicant rejected this offer.

The JAB adopted its report on 23 July 2000. Its evaluation and judgement, and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGMENT

...

a) The Board noted that the administration's decision to consider the Appellant's request for secondment as resignation was not well founded since the Administration did not follow any rule or regulation governing that matter.

b) The Board noted that the Administration deleted the Appellant's post but it did not follow Personnel Directive A/9 concerning the deletion of posts and the staff member's status afterwards. It should have applied redundancy rules on him i.e. informing the Appellant that he is provisionally redundant and informing him of his entitlements according to that rule. Furthermore, the Board is of the opinion that the Administration should have waited until the end of the notice period and then apply any action necessary. Therefore the Board believes that the Administration [in accordance with] rule 109.11 ... should compensate the Appellant for the rest of his contract.

...

e) ... [T]he Board is of the opinion that the Appellant's conduct in arranging his travel to Tanzania while working with UNRWA is considered a hasty decision not taking into consideration the consequences, moreover, the Board believes that the Appellant should have reported back to duty after his annual leave to prove that he did not have the intentions of abandoning his post.

f) Based on the forgoing, the Board believes that the [Administration's] decision, despite its irregularities was taken without prejudice.

IV. RECOMMENDATION

26. ... [T]he Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be rejected.

However, the Board is of the opinion that the Appellant should be compensated as per rule 109.11."

On 5 September 2000, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him/her as follows:

"...

I have studied the Board's report. Regarding the Board's finding that the provisions of paragraph 14 of Personnel Directive A/9 on Redundancy should have been applied, it was the Administration's position and I agree with that position, that this was overtaken by events once you abandoned your post in February 1999. The Administration's decision to separate your services for reason of resignation, rather than for abandonment of post was well-intentioned and not prejudicial to you in any way. In this regard the Board correctly noted that your request for secondment of 4 February 1999 was late in view of the Tribunal's offer to start immediately and that your travel to Arusha was already arranged at a date (12 February 1999) which was only eight days later than your request. Further, the Board correctly stated that you should have reported back to duty after your annual leave to prove that you did not have the intentions to abandon your post. The Administration had no other option than to believe, and this was later confirmed, that you had accepted a job offer although you had clearly not been released on secondment. In view of the foregoing, I have accepted the Board's recommendation that the Administration's decision should be upheld and have dismissed your appeal.

By abandoning your post, you abandoned any entitlement to compensation you might have had, and, in any event, you have already refused a settlement in an amount equal to, at the very least, the most you might have received under Rule 109.11 had you not abandoned your post. Thus, I have determined that no compensation should be paid."

On 11 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant did not have the intention of abandoning his post. His decision not to report back for duty following his annual leave was only made after he had been informed that his post was being deleted and that the establishment of a

similar post was not foreseen in the future, and that the Agency had accepted his resignation.

2. The Agency's failure to give the Applicant an International staff appointment at P3 or a secondment to ICTR is evidence of bad faith against him as his wishes were clearly both in the Agency's interest as well as his own.

3. As he did not abandon his post, the Administration's decision not to apply the provisions on redundancy and compensate him accordingly amounted to prejudice.

Whereas the Respondent's principal contentions are:

1. The decision not to second the Applicant to ICTR was not prejudicial, as at no time the Agency has ever seconded a monthly paid staff member to another United Nations organization.

2. Even if the Applicant's actions did not amount to a resignation by necessary implication, the Applicant cannot be heard to complain when he is given a more favourable mode of separation (resignation) than his actions would have justified (summary dismissal or separation for abandonment of post).

3. The Respondent submits that the Applicant lost his right to a termination indemnity because his appointment was not terminated by the Agency in the manner contemplated by clause 17(B) of his letter of appointment, but by his own actions prior to the date when the Agency's termination was to take effect.

4. The Applicant has failed to discharge the burden to show that the administrative decision was motivated by prejudice or bias or that it was procedurally defective.

The Tribunal, having deliberated from 25 June to 21 July 2003, now pronounces the following Judgement:

I. The Applicant commenced employment with the Agency as a Personnel Officer (International) UNRWA Headquarters, Gaza, on 1 March 1998. The terms of his appointment were indisputably those offered to him by the Agency in its letter of 27 January 1998 which terms were accepted by the Applicant on 3 February. The Tribunal says "*indisputably*" as those terms were as of 1 March the only terms in existence. The

offer letter already referred to contemplated that the Applicant's employment would commence "*on or about 15 February 1998*"; that it would be for a fixed term of one year; that the Applicant would be required to serve a probationary period of six months duration; and that, subject to satisfactory performance, his appointment would be extended for a further year.

Because of reasons unknown to this Tribunal (and which do not effect the legal issues in the case) the Applicant's employment commenced on 1 March 1998, rather than 15 February, and because his performance was at all times satisfactory, the Applicant effectively acquired the right to a two-year term of employment commencing on 1 March 1998 and expiring on 28 February 2000, unless otherwise lawfully terminated. The offer letter of 27 January, expressly provided that the Applicant's appointment was to be subject to the Area Staff Regulations and Rules.

II. On 19 March 1998, nearly three weeks after he had commenced his said employment, the Applicant signed a letter of appointment referred to as a "Category X" letter of appointment, which set out terms very different to those which had been contained in the offer letter of 27 January and which, from the point of view of the Applicant, were very disadvantageous to him when compared with the terms contained in the letter of 27 January upon which he had been recruited. The circumstances whereby the Applicant had come to sign the "Category X" letter of appointment have never been explained, and the Tribunal has no knowledge thereof. In particular, the "Category X" letter of appointment provided, *inter alia*:

- (a) That the Applicant would not be an Area staff member of the Agency;
- (b) That the Area Staff Rules would not (save for where expressly set forth) apply to his appointment;
- (c) That the term or duration of his appointment would be from 1 March 1998 to 31 December 1999;
- (d) That the Applicant could be terminated with 30 days notice or no notice in the event of his abandoning his post;
- (e) That, should the Applicant's appointment be terminated by notice, he would be entitled to a termination indemnity equal to one fifth of his base monthly salary for each month of uncompleted service; and,

- (f) That his employment with the Agency would be governed exclusively by the *"present letter of appointment"*.

Here again, it has never been explained why the Applicant should have been expected to surrender and did purportedly surrender his rights, privileges and obligations as a staff member as conferred by the letter of appointment of 27 January 1998 or why he agreed to an effective reduction in the duration of his contract or the duration of his employment from an expiry date of 28 February 2000 to an expiry date of 31 December 1999 or to what were, from his point of view, significant reductions or diminutions of his security and his entitlements in the event of the Agency deciding to terminate his "Category X" appointment.

Suffice it to say that the Tribunal entertains significant doubts as to the legality or efficacy of what may have been a unilateral alteration of the original terms on which the Applicant was appointed. The Tribunal is far from satisfied that the Applicant had voluntarily and effectively renounced or surrendered the valuable rights that he had acquired when he accepted the original offer of employment, which original rights were greater than those purportedly granted to him by the "Category X" letter of appointment.

This unexplained and mystifying purported alteration in the Applicant's conditions and this purported significant alteration in the parties contractual terms resulted in an absurd and appalling state of confusion shared by both parties, with neither the Applicant nor the Agency having any clear or consistent view as to what terms now governed their relationship or governed the Applicant's employment. The Applicant at times maintained and believed that his employment was governed by the original terms and at other times by the inconsistent terms as set out in the "Category X" letter of appointment. The Agency similarly took different and inconsistent approaches at different times, so that each party was apparently quite uncertain and confused as to which terms governed their contractual relationship.

III. By fax of 24 July 1998 to the Agency's Personnel Section, ICTR advised the Agency that it would be interested in acquiring the Applicant's services as a Personnel Officer for an initial period of one year and asked that the Agency consider releasing him on secondment for that purpose. It asked, in the event of the Agency being agreeable to the request, that the Agency should confirm that it would reabsorb the Applicant on the completion of his services with the Tribunal.

On 6 August 1998, the Applicant faxed a reply to the ICTR's said fax. He apparently did so on his own initiative rather than on instruction from his superiors or those with authority over him. He advised ICTR that the Agency did not release its staff on secondment but expressed his willingness to resign from the Agency and to take up the offered employment with ICTR.

The Applicant asks the Tribunal to ignore his fax of 6 August 1998 or to exclude it from their deliberations on the grounds that it was "*purely personal*" and not "*an official document*". Apart from the fact that the Applicant's said fax was on an official UNRWA facsimile form and that it had been sent in response to a formal communication sent by ICTR to the Agency rather than to the Applicant in some sort of personal capacity, the Tribunal must reject this submission. It is a document which is very clearly relevant to the issues which arise in these proceedings, and it throws light on matters which are very much in issue between the parties. In these proceedings, the Applicant maintains that there could have been no valid reason why the Agency should not have allowed him to move to ICTR on secondment and that its unwillingness or its refusal must have been actuated by personal spite or malice. The fax is a document in which the Applicant had acknowledged that it was not the Agency's policy to permit such transfers on secondment. The Tribunal knows of no principal of law applicable to the facts of this case that could rule a communication such as this inadmissible or that could justify exclusion of this communication from the Tribunal's consideration, and the Applicant's submission is accordingly rejected.

IV. In response to the Applicant's facsimile of 6 August 1998, ICTR indicated that it would be willing to employ the Applicant on the basis he had proposed, but the Applicant did not take up that offer at that time. The Tribunal assumes that the Applicant's change of heart arose as he had learned of proposed or intended restructuring planned or being considered for the Agency's Personnel Section and the Human Resources Division, and he felt that he might have better prospects if he remained with the Agency rather than transfer to ICTR.

It is clear to the Tribunal that the Applicant had become aware of or believed that the then Head of the International Personnel Section was planning to leave the Agency as of 31 July 1998, and the Applicant hoped or believed that his counter colleague would be promoted to fill that vacancy and the Applicant would in turn be promoted to fill the vacancy created by his counter colleague's said promotion. The Applicant, however, offers no evidence that he would have had a legal or legitimate expectation that he would enjoy

such promotion, but his memorandum of 20 October 1998 to the Agency's Deputy Commissioner General, Gaza, and to other persons clearly indicates that the Applicant had entertained such hopes. The Tribunal does not say that the ambitions entertained by the Applicant were necessarily unrealistic or unattainable, and it expresses no view thereon.

The Applicant's expectations, rather than being fulfilled, were absolutely shattered. The Personnel Section and the Human Resources Division were ultimately restructured in a way very different from the way the Applicant had hoped, and a number of posts were earmarked for deletion, including the post which was being occupied by the Applicant. The Applicant argues that because he was not offered promotion or any improvement in his conditions, and because his post was earmarked for abolition, this indicates discriminatory or prejudicial conduct against him. Here again, he offers no other evidence to support these allegations. The Tribunal is satisfied that there are no circumstances apparent which would warrant such an imputation or inference. It appears to the Tribunal that the restructuring proposed and ultimately implemented was on the face of it a valid and proper exercise of management discretion and finds no evidence to support a finding of malice or any impropriety in relation thereto.

V. In light of the decision which had been made to delete the post occupied by the Applicant, on 27 January 1999, he was written to and advised that his fixed-term "Category X" appointment would not be extended beyond its expiry date, which was stated to be 28 February 1999, and he was purportedly given 30 days written notice "*as required under Para 17 A of your Letter of Appointment*".

This letter of 27 January 1999 is yet another example of the confusion and uncertainty which reigned over what precise terms governed his contract with the Agency. The date "*28 February, 1999*" given as the date of expiration of his contract would have been the expiry of the first year, had he still been employed on the terms set out in the original letter of offer, but it would not have been the final expiry date under the terms set out in that letter, as he was entitled to be retained for a second year because his performance has indeed been satisfactory. Having thereby been advised that the Agency was still, in effect, maintaining that his contract was governed by the original offer letter rather than a "Category X" appointment, it is difficult to understand the reference thereafter to notice "*as required under Para 17 A of your letter of appointment*", as this was a clear reference to the terms of the "Category X" letter of appointment. He was employed either under one

contract or the other, and this letter clearly indicated hopeless confusion as to which terms ruled. Furthermore, had he been employed on the terms of the "Category X" letter of appointment, the expiry date would have been 31 December 1999 rather than 28 February 1999, some ten months earlier.

In any event, on receipt of the said letter of 27 January 1999, the Applicant was led to understand in the clearest terms possible that the Agency had decided to terminate him or to separate him from service at the earliest possible opportunity.

VI. In the circumstances, it was hardly surprising that the Applicant contacted ICTR, who confirmed that the offer of the appointment it had earlier made to him was still available to him, or that he should have decided to take it up at the earliest possible opportunity. It seems quite unreasonable to therefore suggest that his actions in taking up the ICTR offer could be said to have constituted a breach by the Applicant of his contractual obligations to the Agency, let alone misconduct which might have justified his dismissal.

The Applicant, by letter of 4 February 1999, duly advised the Agency that the ICTR post in Arusha was still available and that he wished to commence duties there as of 15 February, wanting to take three days annual leave to say goodbye to his friends and family and to journey more than 1,000 kms to Arusha. He again requested that they release him on secondment to ICTR for the initial period of one year, effective from 12 February. The Agency replied by letter of 7 February 1999, approving the three days annual leave but denying his request for secondment on the grounds that the post he was in was being deleted and that a similar post was not foreseen for establishment. The Agency agreed to accept the Applicant's resignation with effect from close of business on 11 February "*as you have requested*". Whilst the Applicant had not offered his resignation effective from close of business on 11 February or from any time, it is clear from the correspondence and all the surrounding circumstances that the Agency had decided to treat the Applicant's departure to Arusha to work for ICTR as being tantamount to his resignation from the Agency. The Agency chose to categorise it or describe it as such for reasons that it, in good faith, believed to be in the Applicant's best interests, as it preserved for him benefits which he otherwise would have lost had it treated his departure as misconduct or as abandonment of post. When the Applicant had not returned for duty with the Agency on the expiration of the three days leave, and the Agency was aware that he had departed for Arusha and taken up duties with ICTR there, the Applicant can hardly complain that the Agency sought to

describe his departure in the terms most favourable to him and with consequences least harmful to him. The Tribunal is satisfied that although the description of "resignation" was not legally justified, it did no wrong or injustice to the Applicant nor does it give rise to grounds that would justify an award of damages or other compensation.

On 15 February 1999, when the Applicant had not returned for duty with the Agency and the Agency was then aware that he had taken up his post with ICTR in Arusha, the Director wrote to the Applicant advising him that his failure to return to his duty with the Agency constituted a *clear case of abandonment of post but that it was in effect being treated as "an acceptance of your resignation" which is definitely in your interest as compared to abandonment of post*. Accordingly, the Applicant was fully informed of the true situation, he knew there was no misunderstanding, and in the circumstances, his claim for compensation under this heading is dismissed.

VII. On 6 April 1999, the Applicant appealed to the JAB matters arising from the events which had occurred and which resulted in his separation from service with the Agency. It seems to the Tribunal to be relatively unimportant whether this separation should be described in these proceedings as having occurred by reason of resignation, expiration of contract, abandonment of post or other reason. The circumstances as to how and why it occurred are quite clear. In his appeal to the JAB, the Applicant complained, inter alia, of the following matters:

- (a) That his contract with the Agency would have expired on 28 February 2000, because he had satisfactory performance, pursuant to the terms of the original contract whereby he had been recruited. He argues against what had been at one time, the Agency's contention, that his original appointment had been for one year, renewable for another year at the Agency's option.
- (b) What he terms unequal treatment and discrimination because the Agency had declined to grant him leave to join ICTR on secondment.
- (c) Wrongful designation of his separation from service by the Agency as "resignation".
- (d) Deletion of his post within the Agency without regard to the relevant Area Staff Rules.
- (e) Threatening to terminate his appointment for "abandonment of post".

- (f) Conduct on the part of the Agency which the Applicant alleged was extremely degrading, unprofessional, abusive and discriminatory treatment, which he alleged had been exercised against him since 1 September 1998.

VIII. In early July 1999, the Respondent, through its Head Area Personnel Section and its Legal Adviser, sought to open up negotiations with the Applicant in relation to issues which had been raised in his appeal to the JAB. The Applicant indicated that should the Agency wish to make a settlement offer to him, it should make it in writing. By letter of 14 July 1999, the Applicant was offered, by way of settlement of his said appeal, the sum of three months net base salary in lieu of provisional redundancy and also a termination indemnity calculated in accordance with the "Category X" formula (one fifth of his base monthly salary for each month of uncompleted service) should he withdraw his appeal.

Needless to say, the Tribunal always recommends and encourages parties in dispute to seek to resolve their differences by agreement, so as to spare them the cost (both emotional and financial) of engaging in proceedings; to spare them the delays attendant on such proceedings; and, because it is usually easier for parties to live with and move forward on the basis of "*agreed settlements*", rather than to live under terms which have been decided and accordingly thrust upon them by an outside party. Such settlements further free up the United Nation's internal justice system so that backlogs there can be reduced or even cleared. Accordingly, the Tribunal feels that settlement negotiations should always be welcomed and never discouraged.

It is perhaps unfortunate that in this case the Applicant, who was not represented by legal counsel, did not fully appreciate the legal culture attendant upon such negotiations, which is that offers made by way of negotiation (rather than unqualified admissions of fact) are usually considered to be made without prejudice, meaning that such offers should not ordinarily be disclosed to the Tribunal or other body charged with determining the issues in dispute, if the settlement negotiations have not concluded successfully. This is because parties talking to see if the issues can be amicably resolved should be encouraged to make concessions for the purpose of the negotiations and should be encouraged towards frank exchanges of views and

should not be inhibited from so doing by a fear that such concessions might be held or used against them, should negotiations break down.

IX. In the instant case, because the Applicant had no legal counsel, he immediately perceived the Agency's settlement offer to be a sign of weakness, and perhaps he believed it was made because the Agency felt it had no answer to his case. He therefore sought to exploit his belief by forwarding the said letter of 14 July to the JAB for its information, hoping that its existence would persuade the JAB as to the merits of his case. He declined to accept the said settlement offer. He felt that the amount offered was inadequate and further felt it did not address or deal with many of the issues which he had raised. He responded by rejecting it and sought, inter alia, much enhanced or improved terms, including a term that he be installed in a newly created post within the Agency, which would have given him substantial promotion. He also sought payment of \$7,000,000 as compensation for the wrongs that he alleged he had suffered at the hands of the Agency.

X. In the hope that what has happened in this case will not discourage parties in future cases from entering into settlement negotiations, the Tribunal hereby declares that for the future, it proposes to consider that settlement proposals falling short of unqualified admissions of fact are to be presumed to have been made without prejudice and should not be disclosed to JABs, JDCs or other such bodies or to the Tribunal, save with the expressed agreement of both parties. The Tribunal believes, that if parties who wish to enter into negotiations feel that matters conceded for the purpose of those negotiations might later be used against them should negotiations fail, this discourages negotiations and this would be detrimental to the administration of justice and to the achievement of resolutions of differences without confrontational and time consuming proceedings. In furtherance of its objective to further amicable resolution, the Tribunal proposes that parties be advised, when entering into negotiations, that if settlement offers or discussions are made in written instruments, such documents as may contain settlement proposals should be headed "*Without Prejudice*" or "*For Settlement Purposes Only*". Also, in appropriate cases, it should be made clear to the parties to whom such documents are addressed that the content of such documents or the nature or terms of offers made should be confidential to the parties and should not be disclosed to other persons without the expressed agreement of all parties to the negotiations. They

should be advised that, in particular, the existence of such negotiations should not be disclosed to the body charged with the determination of the issues in dispute, should the settlement negotiations prove inconclusive.

XI. The Applicant's appeal to the JAB duly came on for hearing and, on 23 July 2000, it rendered its report and recommendations on the issues raised. In summary the JAB concluded:

1. That the Administration should not have taken the Applicant's request for secondment to ICTR and that his departure to Arusha to take up his position there was a resignation by the Applicant from his position with the Agency.
2. That the Agency should have applied the Area Staff Rules regarding redundancy to the Applicant, and in particular, referred to staff rule 109.11 and to the obligations thereunder to pay termination indemnity. It noted that the Applicant had made a late request for secondment, and it was of the view that he should have reported for duty after his annual leave, so as to prove that he did not intend to abandon his post.
3. It believed that the Administration had acted without malice or prejudice.
4. It recommended that the Applicant's appeal be dismissed but that he receive compensation pursuant to the terms of the "Category X" letter of appointment, namely one fifth of one month net base salary for each month of uncompleted service.

The Commissioner-General considered the report of the JAB. He advised the Applicant that he believed that any consideration of rules regarding redundancy had been overtaken by events, namely the Applicant leaving for Arusha in February 1999 and not having returned from annual leave. He accepted that the Administration had no option but to believe that the Applicant had accepted the job offer from ICTR, even though he had not been released on secondment. As a result, he accepted the JAB's recommendation that the Applicant's appeal be dismissed.

XII. In his submission to the Tribunal, the Respondent firstly submits that the Tribunal should find that the Applicant's terms of employment were those set out in the "Category

X" letter of appointment rather than the earlier letter which set out the terms upon which he had been recruited and upon which he had commenced his employment with the Agency. Nonetheless, the Respondent then sensibly recognised and conceded that the situation was not unequivocal and accepted that the "Category X" letter of appointment had been ignored or not recognised as applying from time to time. In view of the foregoing, the Respondent now readily concedes that 28 February 2000, being two years after commencement of the Applicant's monthly paid employment, should be construed as the appropriate date of the end of the Applicant's contract. This is the finding which would have been reached by this Tribunal, even if this concession had not been made.

XIII. The Respondent now submits that, whilst the view held and expressed by the Administration as of January 1999 - that the Applicant's contract with the Agency was for one year with the Agency having the option to extend it for a further year - was erroneous (the true position being that the Applicant had the right to an extension of that further year, his performance having been satisfactory), the letter of 27 January 1999 should be construed as a letter giving 30 days notice of termination in accordance with Clause 17 A of the "Category X" letter of appointment. Whilst the Tribunal understands the Respondent's submission as to what the finding should be, in the view of the Tribunal, such a finding could only be made if the Tribunal were to hold that both contracts could be read together and were compatible. In the view of the Tribunal, this cannot be done. The contracts cannot be construed as if the duration of the contract was to be determined by reference to the original letter of appointment on which the Applicant was recruited, while the termination provisions were to be determined by reference to the "Category X" letter of appointment. It can hardly be argued that the "Category X" letter of appointment was ineffective in relation to the duration of the contract but effective for only the term which dealt with termination.

The Tribunal is satisfied that the letter of 27 January 1999 did not accurately address the Applicant's true legal situation and was indeed erroneous when it stated that the expiry date for the Applicant's fixed-term appointment was 28 February 1999. This inaccurate letter was the proximate or immediate spur which caused the Applicant to take up the ICTR post. Seeing that the writing was on the wall and that the Agency intended to terminate his appointment at the earliest possible time, the Respondent can hardly now reasonably argue that the Applicant was in breach of his contractual obligations or was guilty of abandonment of his post in taking up the

ICTR position which was still available to him, let alone argue that the Applicant was guilty of misconduct in doing what he did. In the opinion of the Tribunal, the Applicant made an eminently sensible and proper decision in again seeking leave to take up the ICTR position on secondment, and knowing that this would be declined, in taking it notwithstanding that approval for secondment would not be forthcoming. He did no more than fulfil his duty to mitigate his loss. He was faced with the choice of almost immediate termination and unemployment, had he decided to remain for a further short time with the Agency, or alternatively, of taking up the position with ICTR in Arusha. As far as the Tribunal is concerned, he made the only appropriate and reasonable choice.

Accordingly, the Tribunal rejects the Respondent's submission that the Applicant constructively resigned or abandoned his post or otherwise breached his contract with the Agency.

XIV. The Respondent (again, properly, in the view of the Tribunal) has decided to put the settlement offer made in the course of the JAB proceedings back on the table and is willing to pay that to the Applicant.

XV. In the view of the Tribunal, however, the sum offered by the Respondent is not sufficient or adequate compensation for the Applicant in all of the circumstances. In the opinion of the Tribunal, this sum does not contain adequate compensation for the harm inflicted on the Applicant arising from the confusion created by the terms of his employment and the error made by the Administration as to when the contract, as per the terms of the original offer of appointment, expired. The Tribunal has already ruled that had the concession offered by the Respondent not been made, the Tribunal would have ruled that the Applicant's term would have continued until 28 February 2000, in the light of his satisfactory performance, unless lawfully terminated prior to that time. In the opinion of the Tribunal, the Applicant should be compensated in the amount equal to seven months net base salary.

XVI. The Tribunal, like the JAB, finds no evidence to support the Applicant's allegations of prejudice or malice. As to the Applicant's contention that there were no reasonable grounds upon which the Agency could have declined to allow

secondment to the ICTR post for its duration, this submission is rejected. Not only were the reasons advanced by the Agency for its refusal perfectly valid, but the Applicant had already acknowledged that it would have been against the Agency's policy and practise to have permitted such a move on secondment. He cannot now be seen to complain that this policy was adhered to in his case and that an exception was not made for him.

XVII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant seven months net base salary at the rate in effect at the time of his separation from service, as compensation; and,
2. Rejects all other pleas.

(Signatures)

Kevin Haugh
Vice-President, presiding

Omer Yousif Bireedo
Member

Jacqueline R. Scott
Member

Geneva, 21 July 2003

Maritza Struyvenberg
Executive Secretary

/H11AZ



Administrative Tribunal

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1103

Case No. 1198: DILLEYTA

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas, on 10 June 2001, Aden Mohamed Dilleyta, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an Application containing pleas which read, in part, as follows:

"II: *PLEAS*

7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the Respondent to produce ... files and documentary evidence ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Executive Director of UNICEF to summarily dismiss the Applicant from service;

(b) *to find and rule* that the UNICEF Ad Hoc Joint Disciplinary Committee [(JDC)] erred in matters of fact and law in reaching its conclusions that the Applicant was guilty of misconduct ...

(c) *to order* that the Applicant be reinstated in service at the NOC level, with retroactive effect from 23 November 1999;

(d) *to award* the Applicant ... compensation on an exceptional basis in the amount of three years net base pay for the actual, consequential and moral damages suffered ... for the denial of due process and fair treatment ... and for the effects of the Respondent's prejudicial actions on him and his family;

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials ... be removed from the Applicant's records;

(g) *to award* the Applicant as costs, the sum of \$10,000.00 in legal fees and \$500.00 in expenses ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and twice thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 28 February 2002;

Whereas the Applicant filed Written Observations on 25 March 2003;

Whereas, on 1 April 2003, the Respondent filed an addendum to the Respondent's Answer;

Whereas on 9 April 2003, the Applicant submitted an additional communication;

Whereas, on 27 June 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a three-month fixed-term appointment as a Project Assistant at the GS-6 level, in Djibouti, on 1 March 1989. On 1 January 1993, he was promoted to the post of Assistant Information and Communication Officer at the National Officer category. At the time of the events which gave rise

to the present Application, the Applicant was serving on a two-year fixed-term appointment as Communication Officer.

On 29 March 1999, the Applicant was informed that an audit was being conducted in the UNICEF office in Djibouti and that the preliminary findings suggested his involvement in serious irregularities. He was further informed that, pending the completion of the investigation, he was being placed on suspension with pay but that this suspension did not constitute a disciplinary measure.

According to the Audit Report, catering services were obtained from a local bakery for the celebration of the Day of the Child, which took place on 22 November 1998. An invoice for 320,000 Djibouti francs (DF), supposedly issued by the bakery, was certified for payment by the Applicant and a cheque payable to the bakery was issued. Since this was a procurement action above US\$ 500, it required a purchase order, which was not found and therefore the case was investigated. The investigators met with the owner of the bakery and his son who, when shown a copy of the invoice, indicated that it was false and that the original order from UNICEF was for DF38,000 only. They produced a copy of the bakery's original invoice, amounting to exactly DF38,000. Upon review of a copy of the cheque it was noted that it was decrossed by the Applicant and endorsed by him to a UNICEF driver, for cash. The driver admitted to having cashed the cheque and indicated that he paid the bakery DF38,000, paid also another supplier for drinks, and kept the rest of the money.

The Audit Report relates to another incident, regarding two invoices which the Applicant had certified for payment on 26 January 1995. The first invoice, for DF330,000 was printed on Ministry of Health letterhead, but did not show the name and title of the government official requesting payment, did not bear a stamp and the signature was unreadable. The second invoice, for DF215,000 appeared to be computer-generated and only indicated the names of two alleged suppliers. The investigation uncovered a hand-written note signed by the Applicant, addressed to the former Operations Officer, requesting that the cheques in payment for these services be made "to bearer". This, allegedly, at the request of a government official. The cheques were issued accordingly. Upon review of these cheques it was noted that both had been cashed by the Applicant's wife (who was a Secretary in the UNICEF Djibouti office).

On 9 June 1999, the Director, Division of Human Resources (DHR), wrote to the Applicant, transmitting a copy of the Audit Report and presenting him with formal charges as follows:

- "1. [The Applicant] misappropriated UNICEF resources, acted recklessly in [his] certification for payment of services provided to UNICEF, made false certifications and wilfully disregarded supply procedures...
2. [The Applicant] violated UNICEF procedures when [he] instructed that two particular cheques, which constituted payment for services that UNICEF had apparently committed to fund and which [the Applicant himself] certified, be issued to bearer".

According to DHR, as regards the first charge, the Applicant knew or should have known that the invoice was false; his certification for payment of the false invoice violated UNICEF procedures; and, he had wilfully disregarded supply procedures and acted outside the scope of his authority. The Applicant also failed to follow sound financial practices when he had uncrossed the cheque issued to the bakery and further, the Applicant had no authority to endorse the cheque to a party other than the payee. Regarding the second charge, in instructing that the cheques be issued to bearer, the Applicant violated UNICEF procedures and undermined financial controls, placing UNICEF's financial resources at risk since such cheques could be cashed by anyone, as indeed happened when the Applicant's wife was able to cash the two cheques.

The Applicant was informed that his above described actions represented a clear violation of the highest standards of integrity expected of international civil servants and constituted serious misconduct, with which he was charged.

On 11 July 1999, the Applicant responded to the charges, claiming his innocence while adding that the accusations against him were false, and requesting that his suspension with pay be lifted. The Applicant maintained that he had to make decisions out of the scope of his authority because the "Delegate Representative" was absent and that he had made mistakes due to lack of knowledge of the administrative and financial procedures of UNICEF. He further alleged that the pressure from the Djiboutian authorities led to taking liberties with procedure in order to preserve cordial relations and trust with them. The Applicant concluded by adding that his acts were not of a criminal nature since the intention to cause damage was not there, and that he had always been an exemplary employee.

On 23 November 1999, the Applicant was informed that, following careful review of the matter as well as consideration of his 11 July letter, the Executive Director, UNICEF, had decided to summarily dismiss him. The Applicant was provided with a detailed response refuting each of the claims contained in his 11 July letter.

On 12 January 2000, the Applicant submitted his request for review of the decision to summarily dismiss him and, on 31 May, he was informed that his request had been referred to an ad hoc JDC.

The JDC submitted its report on 10 January 2001. Its findings, conclusions and recommendation read, in part, as follows:

" ...

5. The JDC ... concluded ... that ... [the Appellant] ... was responsible for a reckless certification, a false certification and a willful disregard of supply procedures. ...

6. The JDC does wish to note that in general over the period of 1995 to 1999 during which the two incidents took place that the UNICEF Office appeared to be operating under frequently absent and poor management, with a lack of control, structure and planning that clearly impacted on the performance of the entire Office ... This environment might well be considered as an aggravating circumstance, particularly for someone left to act as Officer in Charge without adequate background or management skill to handle the situation. The responsibility for leaving [the Appellant] in charge, for poor management, and the lack of oversight and accountability for basic UNICEF functions surely extends upward and to others. ...

7. ... While the JDC recognizes that charges brought against the Appellant and his conduct must be considered separately from the conduct of others, the Office circumstance seems a relevant consideration in advising on the appropriateness of the most severe disciplinary measure that has been imposed on the Appellant.

8. The JDC concluded, ... , that [the Appellant] actions in both 1995 and 1999 should be considered as misconduct rather than unsatisfactory performance in that despite the aggravating office situation, both incidents were egregious acts that constitute misconduct under the definitions provided by the UN Staff Rules.

9. The JDC noted [the Appellant] allegations of bias and prejudice in consideration of his case. The JDC did not find evidence to support this allegation ...

10. ... the JDC unanimously concluded that the misconduct charges were appropriate for both the 1995 and 1999 incidents and that due process had been regarded. However, with regard to its responsibility to advise on

disciplinary matters, the JDC questioned if the disciplinary measure ... separation from service, with or without notice or compensation in lieu of notice ... might be a more appropriate disciplinary measure, given [the Appellant] ten years of service, and the possible aggravating circumstance of the office situation which was beyond his responsibility. ... the JDC ... can only recommend that the Executive Director ... determine whether the aggravating circumstances of the Office contributed to [the Appellant's] misconduct, and therefore permit a less severe disciplinary measure than summary dismissal."

On 9 March 2001, the Executive Director, UNICEF, transmitted a copy of the JDC report to the Applicant and informed him that:

"After careful consideration of the JDC's recommendation, I have decided to maintain your summary dismissal. I cannot give weight for either exculpatory or mitigating purposes to the circumstances to which the Committee has referred. Your actions were egregious in nature and constitute serious misconduct. You remain personally and exclusively accountable for your acts of serious misconduct in which you knowingly engaged, in violation of the highest standards of integrity."

On 10 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charge of sub-standard performance is not borne out by the record; the evidence does not support the JDC's conclusions.
2. The Applicant was unprepared for the responsibilities of Officer-in-Charge, particularly as he did not receive any formal training from UNICEF regarding the financial rules and regulations.
3. It is unfair to bring charges based upon a transaction that occurred four years earlier.
4. The Applicant did not seek to profit from the transactions.
5. The Applicant's rights of due process were violated.
6. The Applicant appears to have been singled out for especially harsh treatment. The disciplinary measure of summary dismissal is disproportionate even if the Applicant is found to have been grossly negligent.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.
2. The Applicant failed to meet the standards of conduct required of staff members as international civil servants.
3. The Applicant was accorded due process.
4. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

The Tribunal, having deliberated from 27 June to 21 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision to summarily dismiss him from service for serious misconduct. The Applicant claims that his summary dismissal was procedurally deficient, discriminatory in nature and taken without regard to his due process rights and to the procedures as set out in the Staff Regulations and Rules.

II. The Applicant had been serving on a two-year fixed-term appointment as Communication Officer at the UNICEF Office in Djibuti when, on 29 March 1999, he was notified that an audit of this office suggested his involvement in serious irregularities. The Applicant was placed on suspension with pay while the investigation continued and, on 9 June, he was presented with the formal charges against him, as follows:

(i) misappropriation of UNICEF resources, acting recklessly in certifying payments for services provided to UNICEF, making false certifications and willfully disregarding supply procedures, and (ii) violation of UNICEF procedures when instructing that two checks, which constituted payment for services that UNICEF had committed to fund and which the Applicant had certified, be issued to bearer.

III. The Applicant responded to the charges on 11 July 1999, claiming his innocence while explaining that his actions were the result of the necessity to act under time pressure, without any training in financial procedures and with no guidance from his supervisors. On 23 November, the Applicant's claims were answered in detail and he was informed of the Executive Director's decision to summarily dismiss him in accordance with staff regulation 10.2. Subsequently, an ad hoc JDC was constituted and submitted its report on 10 January 2001, unanimously concluding that, "the misconduct charges were appropriate and that due process had been regarded". On 9 March 2001, the Applicant was informed of the Executive Director's decision to maintain the Applicant's summary dismissal. This Application followed.

IV. The Applicant contends that the Respondent's decision to terminate him from service was not a proper exercise of the latter's authority and that the finding of misconduct should have been recognized as unsatisfactory performance. The Respondent argues that the decision to separate the Applicant from service constitutes a valid exercise of the discretionary powers of the Executive Director of UNICEF.

V. It has been the longstanding jurisprudence of the Tribunal that the Secretary-General (and through delegation also the administrators of the subsidiary organs such as the Executive Director of UNICEF) has broad discretion with regard to disciplinary matters. (See Judgments No. 300, *Sheye*, (1982) and No. 987, *Edongo* (2000).) This includes the determination of what constitutes "serious misconduct" under the Staff Regulations and Rules and what is the proper punishment for such conduct. (See Judgments No. 815, *Calin* (1997), No. 890, *Augustine* (1998) and No. 1050, *Ogalle* (2002).) Yet these broad disciplinary powers are not without limitation. The Tribunal has consistently reaffirmed its competence to review the Secretary-General's exercise of these discretionary powers, though it has also held that such review is confined to certain exceptional conditions, i.e. to determining whether these actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See Judgments No. 993, *Munansangu* (2001) and No. 1090, *Berg* (2003).)

Thus, in disciplinary cases, the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose, (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness (See Judgment No. 898, *Ugbla* (1998) and No. 941, *Kiwanuka* (1999).)

VI. Having reviewed the facts and particularly the explanations provided by the Applicant for his actions, the Tribunal concurs with the JDC's conclusion that the Applicant's actions "should be considered as *misconduct* rather than *unsatisfactory performance*", the latter being conduct ordinarily characterized as arising out of innate incapacity or inefficiency. The Tribunal accepts that the Respondent had established before the JDC a *prima facie* case in relation to the allegations of misconduct. This did not mean that unless the Applicant established his innocence or provided some satisfactory explanation for his conduct, the JDC had to decide against him. The finding that a *prima facie* case had been made means only that the Respondent had established a case, which would entitle the JDC to conclude that the Applicant was guilty, when it accepts and is persuaded by the evidence offered as to his guilt. In this case, the JDC rejected the Applicant's protestations and explanations. The Tribunal is satisfied that it was entitled to do so.

The Respondent refers to the cases of *Kiwanuka*, *ibid*, and *Jhuthi*, (Judgement No. 897 (1998)) contending that, if a *prima facie* case of misconduct is made, the Applicant must provide a proper explanation or evidence to rebut it, otherwise, a conclusion of misconduct could be reached. Insofar as the Respondent relies upon these two cases claiming that they support the above proposition, the Tribunal wishes to refer to the appropriate passage from *Jhuthi*, which reads as follows:

"In disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a *prima facie* case of misconduct, that conclusion will stand. The exception is if the Tribunal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable. This is what was meant when the Tribunal stated in Judgement No. 484, *Omosola* (1990), paragraph II, that 'once a *prima facie*

case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question.”

The citation relied upon by the Respondent does not support the contention argued for by the Respondent. The onus of proof does not shift to the Applicant upon the establishment of a *prima facie* case. It need hardly be added that, where the evidence offered establishes a *prima facie* case, and that evidence is not contradicted, or where the conduct is not explained, such case will almost inevitably result in a conviction.

In this case, the Applicant failed to present any convincing explanation for his actions in certifying payments that he knew, or should have known, were based on false invoices. Likewise, his explanations for instructing that cheques be made payable to bearer and thus enabling a person other than the payee, and in this case the Applicant's wife, to cash them, were unconvincing. The Tribunal believes that such actions cannot be excused by claiming to have been pressured by time constraints, nor by lack of knowledge of the Financial Rules. Common sense and integrity would suggest avoiding such actions.

VII. The decision to summarily dismiss the Applicant was a proper exercise of the Executive Director's authority and did not violate the Applicant's rights. The choice of disciplinary measure to be imposed, pursuant to Staff regulation 10.2, falls within the Secretary-General's discretionary powers (Judgments No. 479, *Caine* (1990); No. 542, *Pennacchi* (1991); and, *Kiwanuka* (*ibid.*)). Staff members have a duty to maintain the highest standards of conduct and the Respondent has the responsibility to enforce those standards. The Tribunal finds that the procedures set forth in Chapter 15 of the UNICEF Human Resources Manual had been adhered to and that the Applicant's rights were observed.

VIII. The Applicant claims that there was a cultural bias implicit in the charges brought against him because the investigation did not take into account the difficult circumstances under which the UNICEF Djibouti Office was operating, nor the fact that he had not received any formal training from UNICEF on its financial rules.

It has been the consistent jurisprudence of the Tribunal that, where an Applicant alleges bias or other improper motivation or extraneous factors vis-à-vis a contested decision, that he carry the burden of proof in relation thereto. (See Judgements No. 553, *Abrah* (1992), and No. 874, *Abbas* (1998).)

The Tribunal is of the opinion that whilst the environment in which the UNICEF Djibouti Office was operating indeed left something to be desired, the Applicant has failed to establish any bias against him. Accordingly, the Tribunal rejects the Applicant's allegation that the investigation was tainted with bias or other extraneous factors.

IX. The Tribunal took note of the Applicant's request for production of certain documents which, the Applicant argues, would support his claim that the Organization did not sustain any financial loss due to his actions. The Tribunal rejects this request, as this is not germane to the issue of whether the Applicant is responsible for the misconduct that he had been charged with. Even if no monetary loss occurred, the Applicant was still responsible for reckless certification, a false certification and a willful disregard of supply and payment procedures. Serious misconduct is not measured by its consequences but rather by the seriousness of the conduct. (See Judgement No. 926, *Al Ansari* (1999).)

X. The Applicant argues that the Respondent's findings that he had been guilty of gross negligence had no foundation, claiming that gross negligence is measured by the damage the negligence has caused or by the intention of the actor found to have been guilty of such negligence. The Tribunal is satisfied that the Applicant's definition of "gross negligence" is erroneous.

XI. In conclusion, the Tribunal holds that the UNICEF Executive Director exercised reasonable and necessary discretion when concluding that the Applicant had engaged in serious misconduct and that he had failed to meet the highest standards of conduct expected of an international civil servant. Further, the Tribunal holds that the Applicant had been accorded due process, and that the decision to summarily dismiss him was not tainted by prejudice, arbitrariness or other extraneous factors.

XII. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Mayer **Gabay**
First Vice-President, presiding

Kevin **Haugh**
Second Vice-President

Spyridon **Flogaitis**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

/DILLEYTA



Administrative Tribunal

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1104

Case No. 1199: TANG

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas at the request of Mallika Tang, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 July 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 June 2001, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

...

12. On the merits, the Applicant respectfully requests the Tribunal to find:

a) that the Administration has consistently failed to follow proper classification appeal procedures;

b) that the Respondent further denied the Applicant due process by ignoring argumentation she provided in support of the classification of her post to a professional level ...

13. Whereafter the Applicant ... requests the Administrative Tribunal to order:

a) that the Administration [reclassify] the post to a professional level

...

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and twice thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 8 February 2002;

Whereas the Applicant filed Written Observations on 13 March 2002;

Whereas the facts in the case are as follows:

The Applicant joined the Economic and Social Commission for Asia and the Pacific, Bangkok (ESCAP), on 23 May 1978, as a Computer Clerk at the GS-6 level. The Applicant's post was reclassified several times and, at the time material to this case, she was serving at the GS-9 level (on a nine level grading structure) as Programmer Assistant, in the Electronic Services Section (ESS).

In 1991, the International Civil Service Commission (ICSC) approved the Global Classification Standard for Non-Headquarters Duty Stations, based on a seven-level grading structure. Accordingly, on 15 September 1994, the Applicant's post was reclassified at the GS-7 level and her functional title was changed to Computer Systems Assistant.

On 7 November 1994, the Applicant appealed the classification level of her post, arguing that, while the job description for her post initially included a requirement for a university degree, this was changed following instructions from Personnel Services Section, to delete any such requirement. She further argued that as a result of this change in wording, the job description no longer reflected the full requirements of the job and that this was detrimental to the proper classification of the post. On 16 December, the Chief, ESS, submitted a memorandum in support of

the Applicant's appeal, clarifying that the Applicant's post is assigned the duties and responsibilities of a P-3 programmer/analyst.

On 29 December 1997, the Applicant wrote to the Executive Secretary, ESCAP, requesting information on the status of her appeal and, on 13 January 1998, the Chief, Division of Administration, ESCAP, wrote to the Chief, Common System and Specialist Services, OHRM, stating that the case had not been followed up through an oversight and requesting expeditious action on the case. On 22 January, the Chief, Division of Administration, was informed that, in accordance with the procedures set forth in administrative instruction ST/AI/398 of 19 September 1994, the appeal had been reviewed by the Common System and Compensation Section and its report would be submitted to the New York General Service Classification Appeals and review Committee (NYGSCARC).

On 24 December 1999 and, again, on 29 August 2000, the Applicant wrote to the Chief, Division of Administration, inquiring as to the status of her appeal and reminding him of the lengthy period that had elapsed since filing it.

On 20 December 2000, the NYGSCARC issued its report stating, *inter alia*:

"13. The ... Committee ... concluded ... that the predominant work of the post failed to match the definitions contained in the Professional category ...

14. With respect to the issue regarding the university degree, the Committee agreed that the requirement for a university degree should be dependent on the functions of the job description, and not the qualifications of the incumbent. The Committee noted that the incumbent had a degree in Mathematics. The Committee compared the functions of the post to the requirements and agreed that the work described therein required only a combination of experience, coupled with the specific programming courses.

Conclusion

15. The Committee ... determined that in accordance with the established methodology, the work and nature of the post best fit the General Service category, as defined under ... *Programming assistance*. ..."

Also on 20 December 2000, the Assistant Secretary-General for Human Resources Management informed the Applicant that she had accepted the recommendation of the NYGSCARC.

On 23 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The initial classification had failed to take into account the true nature of the position.
2. The Administration failed to follow proper procedures and to give thorough consideration to all pertinent elements of the appeal and has thus denied the Applicant her rights of due process.
3. Consideration of the classification appeal was inexcusably late.

Whereas the Respondent's principal contention is:

The Respondent's discretionary decision with regard to the classification level of the Applicant's post was properly taken following an independent review by a specialized appeals body.

The Tribunal, having deliberated from 26 June to 21 July 2003, now pronounces the following Judgement:

I. The Applicant joined the Organization as a Computer Clerk at the GS-6 level with ESCAP, Bangkok, and gradually advanced to Programmer Assistant at the GS-9 level. Her Application stems from a reclassification exercise that replaced the then existing nine level grading structure with a seven level scale, as a result of which the Applicant's post was reclassified at the GS-7 level, with the functional title of Computer Systems Assistant. The said reclassification exercise followed the approval by the ICSC of a new classification scheme, the Global Classification Standard for Non-Headquarters Duty Stations, which was implemented in Bangkok, with effect from 15 September 1994.

On 7 November 1994, the Applicant appealed the new classification level of her post. In her appeal the Applicant claimed that, in determining the new grade of her post, the Administration relied on a job description that did not include the requirement of a university degree, which requirement was initially included in the job description but was subsequently deleted, resulting in an inaccurate job

description. The Applicant - who has a university degree - argued that, had this factor been taken into consideration, the post would have been classified at the professional category.

II. The qualifications of staff members are not a consideration in decisions regarding the classification or reclassification of posts and, job descriptions, on which the classification of posts rely, do not depend on the attributes of the encumbering staff member. Such decisions are not, and should not be, based on an individual case but rather on a general, regularized format, taking into account the organizational needs and the assessment of those needs, as made by the Organization. Indeed, administrative instruction ST/AI/398 of 19 September 1994, entitled "Implementation of the Initial General Service Classification Exercise and the Maintenance of the Classification System at Bangkok" states:

"2. post classification is job-oriented: the classification of each post depends on the nature of the duties and responsibilities assigned to the post and not on the qualifications or experience of the incumbent or candidate for the post".

III. The Tribunal will not normally question decisions concerning classification or reclassification of posts. For a staff member to successfully challenge such a decision, he or she must prove that organizational changes were introduced and implemented with the intention to harm that staff member; demonstrate that prejudice or other improper motivation were behind the contested decision; or, that the Organization did not follow its own principles and guidelines in the formulation and/or the implementation of the new system.

The Tribunal recalls Judgement No. 396, *Waldegrave* (1987), where it held that:

"It is not the function of the Tribunal to substitute its judgement for that of the Secretary-General in job classification matters ... It is instead the function of the Tribunal to determine whether under all the circumstances, the Respondent has acted within his reasonable discretion".

In Judgement No. 880, *MacMillan-Nihlén*, (1998), the circumstances of which were similar to the present case, the Tribunal held that:

“... The Applicant cannot obtain reclassification based on evidence that, on occasion, she was performing higher-level duties than those listed in her job description. The Tribunal concludes that there was no abuse of discretion in this regard by NYGSCARC”.

Having reviewed the documentation contained in the file, the Tribunal could find no evidence that the Organization was prejudiced against the Applicant. On the contrary, the Tribunal is satisfied that the reclassification of the Applicant's post was the result of a general exercise which was implemented throughout the Bangkok Office and which was carried out in accordance with the guidelines as established by the ICSC and in compliance with the applicable procedures, including throughout the appeal process. The Tribunal therefore finds that the reclassification of the Applicant's post was a proper exercise of the Respondent's discretion.

IV. The Tribunal notes, however, that there was a substantial delay in resolving the Applicant's appeal. The Applicant initiated the appeal process in November 1994, yet despite her repeated requests, the case was not finalized until 20 December 2000, when the Assistant Secretary-General for Human Resources Management finally informed the Applicant that she had accepted the NYGSCARC's recommendation, rejecting the Applicant's appeal.

The Tribunal finds this to be an inordinate delay, amounting to maladministration. Furthermore, the Tribunal has previously held, for example in *MacMillan-Nihlén*, (*ibid.*), that an Applicant does not have to show any specific damages resulting from undue delay, since “... an inordinate delay ‘not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant’” (see also Judgements No. 353, *El- Bolkany*, (1985) and No. 414, *Apete*, (1988)).

V. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant the amount of \$5,000 as compensation for the undue delay; and

2. Rejects all other pleas.

(Signatures)

Mayer Gabay
Vice-President, presiding

Spyridon Flogaitis
Member

Brigitte Stern
Member

Geneva, 21 July 2003

.../TANG

Maritza Struyvenberg
Executive Secretary

**Administrative Tribunal**

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1105

Case No. 1208: KINGHAM

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas, on 10 July 2001, Roshan Kingham, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF) filed an Application, requesting the Tribunal, *inter alia*:

7. ...

...

(c) *to decide* to hold oral proceedings ...;

8. On the merits ...

(a) *to find and rule* that the Joint Appeals Board [(JAB)] erred ... in failing to provide appropriate and adequate compensation ... for violation of her rights ...

(b) *to award* the Applicant appropriate and adequate compensation ... for the actual, consequential and moral damages ...

(c) *to award* the Applicant additional compensation for the delays in her case;

(d) *to order* that the Applicant's post be assured of proper classification and that she be afforded every reasonable consideration for promotion to the G-5 level at the earliest opportunity ...;

(e) *to fix ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;*

(f) *to award the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."*

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 28 June 2002;

Whereas the Respondent filed his Answer on 24 June 2002;

Whereas the Applicant filed Written Observations on 16 August 2002;

Whereas, on 22 October 2002, the Respondent submitted comments on the Applicant's Written Observations and, on 4 December 2002, the Applicant commented thereon;

Whereas, on 14 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a six months and 24 days fixed-term appointment as Clerk-Typist at the G-2 level, on 7 May 1980. Her fixed-term appointment was extended several times and, effective 1 December 1982, she was granted a permanent appointment. The Applicant transferred to the Internal Audit Service (now Office of Internal Audit (OIA)) on 26 May 1987 and, effective 27 June 1991, was promoted to the G-4 level with a title of Audit Clerk.

On 19 January 1996, the Applicant was advised that, effective close of business 31 July, her post would be abolished. She was further informed that her name would be placed on a roster for suitable posts; however, if she were not placed on another post prior to the end of the notice period, her services with UNICEF would be terminated. On 12 February 1996, the Applicant requested review of this decision.

On 10 June 1996, the Applicant wrote to the JAB, requesting suspension of action and contesting the decision to abolish her post. The JAB held a hearing on the suspension request on 17 June, during which the Respondent gave assurances that the Applicant would be placed against another post, prior to the effective date of the abolition of her post, maintaining her personal level and grade. Consequently,

the JAB did not make any recommendation. On 19 June the Respondent wrote to the JAB, confirming the above assurances.

On 18 July 1996, the Applicant was informed that, effective 1 August, she would be transferred to the G-3 level project post of Help Desk Clerk in the Office of Administrative Management, while retaining her G-4 personal level and permanent status. On 29 July, the Applicant accepted this position, while seeking written assurance that the placement process would continue and requesting that she be placed in a core post before the end of 1997, in accordance with the remarks made by the Respondent at the JAB hearing. On 7 August, the Respondent replied that UNICEF had, in fact, kept its commitment and that they could not guarantee that the Applicant would be placed in a core post by the end of 1997. Further correspondence on the issue ensued.

The Applicant was subsequently assigned to several other posts, all on a temporary basis, maintaining her personal grade and contractual status.

On 28 January 1999, the Applicant requested the Executive Director, UNICEF, to review the failure by UNICEF to fully implement its commitment to place her in an appropriate post, commensurate with her personal level. On 25 February, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, replied, referring the Applicant to the 7 August 1996 letter. While informing the Applicant that the budget designation of the post she occupied was changed from a project to an established post, in a good faith effort to reach an agreeable solution she presented the Applicant with two options: (a) to resume her officially assigned functions as Help Desk Clerk, or (b) to transfer, along with her established post, to "633 Third Avenue". A job description would be prepared and submitted for classification, to be proposed at the G-4 level. On 5 March, the Applicant expressed her reservations regarding these options.

On 25 March 1999, the Applicant lodged an appeal with the JAB.

On 12 April 1999, the Applicant assumed the Help Desk duties as mentioned in option (b) above; on 13 April she advised the Officer in Charge, DHR, that she considered that arrangement an "ad hoc" one and, on 4 May, she informed him that she wished to proceed with her appeal.

The JAB adopted its report on 24 April 2001. Its considerations and recommendation read, in part, as follows:

"Considerations

17. ...

The Panel concluded ... that the appeal was receivable.

18. ... The Panel concluded that [the] Respondent did eventually fully implement its commitment ...

19. The Panel wishes, however, to underline the word "eventually" in the preceding paragraph. It was not until ... 33 months after the hearing that [the] Appellant was confirmed in a G-4 post. Moreover, at every step along the way ... [the] Respondent failed to take positive action unless and until prodded by [the] Appellant's appeals and complaints.

20. In addition, the Panel found reason to believe that, until its eventual placement action, [the] Respondent had 'been negligent as an employer in failing to extend to the [Appellant] fair and just treatment ...'.

...

Recommendation

22. The Panel recommends that the Secretary-General authorize payment of three months net base salary to Appellant to compensate for the injury suffered.

..."

On 10 July 2001, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 16 July 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General accepted the conclusions of the JAB and, in accordance with its unanimous recommendation, had decided to compensate her in the amount of three months net base salary.

Whereas the Applicant's principal contentions are:

1. Although the JAB recognized that the Applicant's rights were violated, she was awarded only token compensation, which is not commensurate with the harm done to her well-being and her career.

2. The JAB failed to take sufficiently into account the long delays in adjudicating the case.

3. The abolition of the Applicant's post was a reflection of bias against her; she was targeted for separation and suffered discrimination for being an outspoken staff representative.

4. The Respondent failed to apply the established policies with regard to placement of staff in abolished posts.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately and sufficiently compensated for the irregularities in her case.

2. The Applicant failed to produce evidence of a pattern of bias.

3. The Administration has not failed, other than in instances determined by the JAB and accepted by the Respondent, to apply established policies with regard to the placement of staff in abolished posts.

4. The Applicant is not entitled to be awarded the payment of compensation as a result of "administrative delays".

The Tribunal, having deliberated from 1 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant joined UNICEF on 7 May 1980 on a fixed-term appointment as Clerk-Typist at the G-2 level. Her contract was extended and, effective 1 December 1982, she was granted a permanent appointment. On 24 June 1991 she was promoted to the G-4 level as Audit Clerk.

II. On 19 January 1996, the Applicant was notified that her post had been abolished. She was given a six-month notice period, during which efforts would be made to place her on another post, but, she was further informed that, should these efforts prove not successful, her employment would be terminated. The Applicant appealed this decision to the JAB and requested, as an interim measure, that action on the decision be suspended. The JAB held a hearing on the case, during which the Administration gave assurances that another suitable job would be found for the Applicant within the six-month period and that every effort would be made to identify an appropriate post for the Applicant, one which would retain her personal

level and grade. On the basis of those assurances, the JAB made no recommendation.

III. On 18 July 1996, the Applicant was informed that a post had been found for her and that as of 1 August she would be transferred to a G-3 post, while maintaining her G-4 personal level as well as her permanent status. An exchange of letters between the Applicant and the Administration ensued and, by letter dated 7 August, the Administration made clear to the Applicant that, in posting her as stated above, UNICEF had met its commitment as declared before the JAB.

The Applicant was subsequently assigned to various temporary posts, during which time she applied, unsuccessfully, to several posts at the G-4 and G-5 level.

IV. On 28 January 1999, the Applicant wrote to the Executive Director, UNICEF, requesting that she review UNICEF's failure to fully implement its commitment to place her in an appropriate post. The Administration, though claiming that the Applicant's request was time barred, nevertheless offered the Applicant, "in a good faith effort to reach a mutually agreeable solution", two options for her continued employment. The Applicant, having expressed her reservations regarding both options, nevertheless decided to accept one of them. Accordingly, on 1 April 1999, she assumed the duties of the Help Desk post at 633 Third Avenue. This post was to be submitted for classification with the expectation that it would be classified at the G-4 level.

Regardless of the above, the Applicant decided to proceed with an appeal to the JAB. On 24 April 2001 the JAB issued its report, concluding that the appeal was receivable and rejecting the Respondent's argument that it was time barred. On the merits, the JAB determined that, with the new core post offered to the Applicant, the Administration did eventually keep its commitment as made during the hearing on the request for suspension of action. At the same time, the JAB recommended that the Applicant be compensated for the injury she had suffered. The JAB considered that, the fact that UNICEF needed 33 months to honour its commitment, as well as the fact that at every step of the way the Applicant had to appeal and complain in order for the Respondent to take any action, warranted the Applicant being compensated in the amount equivalent to three months net base salary. This recommendation was subsequently accepted by UNICEF.

V. The Tribunal concurs with the JAB's conclusions and recommendation. Indeed, even though the Administration took its time in reaching a conclusive solution of the Applicant's employment problem, it did eventually resolve it. The Applicant was offered a suitable post, at her personal (G-4) level, which post was similar to the initial one that she had held. Although she initially expressed some reservations, the Applicant accepted this post. Moreover, throughout the period, from the abolition of her post to her assignment to the new post, the Applicant was kept in office and never lost her G-4 level or permanent status. Thus, the Applicant did not suffer any financial loss during this time. The Tribunal, however, does recognize that the Applicant had to struggle over an extended period of time to make the Administration meet its commitment and to find her a truly suitable post. This resulted in injury to the Applicant, for which she should be compensated. Having said this, it is the Tribunal's opinion that, the compensation, as recommended by the JAB and accepted by the Respondent, adequately compensated the Applicant for her injuries.

VI. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Mayer Gabay
Vice-President, presiding

Spyridon Flogaitis
Member

Brigitte Stern
Member

Geneva, 21 July 2003

Maritza Struyvenberg
Executive Secretary

/KINGHAM



Administrative Tribunal

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30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1106

Case No. 1209: IQBAL

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas, on 7 July 2001, Khalid Iqbal, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

"SECTION 2

Pleas:

1. I am contesting the Administrative decision ... to terminate me from service on the ground of post reductions. ... I am also contesting ... the recommendation of the Joint Appeals Board Geneva (JAB) ... and [the] Secretary General's acceptance of the said recommendations. ... the said administrative decision was illegal and ... the JAB failed to take cognisance of the illegality because according to the JAB my appeal was time-barred ...
2. I request the United Nations Administrative Tribunal ... to consider that I have adopted proper channels of recourse.
3. ... I request the ... [Administrative Tribunal] to rescind the said decision and order my retroactive reinstatement to the post that was illegally taken away from me ...

...

5. ... while working out compensation, if I were not retroactively reinstated, [the Applicant's hardship should] be given serious consideration. ...
6. ... the entire Administrative decision and steps that led to that decision were illegal.

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 14 June 2002;

Whereas the Respondent filed his Answer on 14 June 2002;

Whereas, on 12 August 2002, the Applicant filed Written Observations amending his pleas as follows:

"1. *The remedies sought by the Applicant*

1. Waiver of time limits ...
2. Reinstatement to my post ... or monetary compensation ..."

Whereas the facts in the case are as follows:

The Applicant joined the United Nations High Commissioner for Refugees (UNHCR) on a three months short-term appointment as an Administrative Assistant at the GL-6 level, in Quetta, Pakistan, on 1 March 1994. His short-term contract was extended twice and, effective 1 August 1994, he was granted a one-year fixed-term appointment. This appointment was extended several times, the last extension being for a two-year period, to expire on 31 July 1999.

On 16 September 1998, the Director, Division of Operational Support, informed UNHCR staff that, following the recommendations made by the Post Review Group and their adoption by the High Commissioner, seven posts in Pakistan field locations would be discontinued. For Quetta, the posts of Protection Assistant and Administrative Assistant were identified for discontinuation.

On 9 October 1998, a comparative review was conducted in order to determine which staff member would be separated as a result of the abolition of the post of Administrative Assistant. On 23 October, the Applicant was informed that, as a result of the comparative review, his fixed-term appointment would be terminated,

with effect from 31 October. He was further advised that he would receive compensation in lieu of notice and termination indemnity.

On 16 May 1999, the Applicant wrote to the UNHCR mediator, requesting her assistance in order to obtain retroactive reinstatement and challenging the legality of the comparative review. The mediator replied on 31 May, clarifying to the Applicant, inter alia, the issues and procedures regarding post discontinuation and comparative reviews and explaining that, unless the comparative review was procedurally flawed or tainted by improper considerations, there was no basis for re-examining the decision taken regarding the termination of his contract. She also pointed out to the Applicant that he was "out of time" to appeal under Chapter XI and that a request for waiver of time limits would have to be "soundly argued".

The Applicant continued to correspond with the mediator who, on 10 August 1999, advised him as to the procedures before the JAB, once again pointing out the issues of time-limit and insufficiency of the substance of his appeal.

On 11 September 1999, the Applicant requested administrative review of the decision to terminate his service due to abolition of post.

On 24 January 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 March 2001. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

59. ... the Panel could see the reasoning by the Appellant that he did not request the administrative review in the hope of gaining a reemployment which, according to the Appellant, was falsely promised by the administration. ... [however] his 'false hope' was dashed at the latest in April 1999. ...

60. ... the Panel noted that, during the internal mediation process, ... the Appellant was strongly reminded of the significance of the time factor by the mediator, already in May 1999. ... The Panel ... could not ascribe other than to the Appellant himself the responsibility of not immediately initiating the appeals process even at this stage.

61. The Panel ... concluded that, although the reasons put forward by the Appellant might have been understandable, they were not ... sufficient to have prevented him from requesting the administrative review in a much more timely manner ...

...

Conclusions and Recommendations

63. ... the Panel concludes that there are no exceptional circumstances warranting a waiver of the time-limit. In this connection, the appeal is time-barred and hence **not admissible**.

...

65. Consequently, the Panel makes no further recommendation to the Secretary-General in connection with the present appeal.

Special remark

66. Notwithstanding the conclusion reached in the present case, the Panel wishes to draw the attention of the Secretary-General on the time-limit granted Appellants in requesting an administrative review.

67. While the two-month period provided in Staff Rule 111.2 (a) may be sufficient for the preparation of the case, it may not provide sufficient time for the parties concerned to find an amicable and informal solution. That is why, as earlier proposed to the General Assembly in 1995, 'in order to enhance earlier reconciliation and resolution of disputes before they develop into formal litigation', the Panel wishes to recommend to the Secretary-General to re-examine the issue of the time-limit, keeping in mind the importance of informal mediation in the resolution of internal disputes."

On 17 April 2001, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the JAB's conclusion and had decided to take no further action on his appeal.

On 7 July 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred when deciding that the Applicant did not present exceptional circumstances, warranting a waiver of the time limits.

2. The Applicant was misled by UNHCR officials that he would be reinstated and, by the time he realized that he "was being cheated", he had missed the deadline for requesting administrative review. The Applicant was a victim of "a trap" that took away his "choice of appeal".

3. The Applicant attempted to resolve the matter via the UNHCR mediator: the Applicant requested administrative review only after exhausting this course of action.

4. The Post Review Group had identified a different post for discontinuation and the comparative review was not conducted in accordance with the UNHCR Staff Administrative Manual.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to comply with the Staff Rules as regards timely filing of a request for administrative review. The appeal was thus time-barred.
2. A waiver of the time-limits was not justified.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Secretary-General's decision, accepting the JAB's conclusion that the Applicant's appeal was time-barred. The Applicant claims that exceptional circumstances existed, warranting a waiver of the time limits as set forth in staff rule 111.2(a).

II. The Applicant was serving as an Administrative Assistant with UNHCR in Quetta, Pakistan, on a two-year fixed-term appointment, which took effect from 1 August 1997. On 23 October 1998, he was informed that his appointment would be terminated with effect from 31 October. The termination of the Applicant's appointment followed the adoption by the High Commissioner of the recommendations made by the Post Review Group, which had conducted a review of the posts in the Field in the context of operational requirements. With respect to the Quetta sub-office, the posts of Protection Assistant and Administrative Assistant had been identified for discontinuation.

On 9 October 1998, a comparative review was conducted to determine which staff member would be separated as a result of the abolition of the post of Administrative Assistant. The Applicant was subsequently informed that, as a consequence of this review, his fixed-term appointment would be terminated in accordance with staff regulation 9.1(b).

On 16 May 1999, the Applicant wrote to the UNHCR mediator, requesting her assistance in obtaining his reinstatement while challenging the legality of the

comparative review. The mediator responded, informing the Applicant, *inter alia*, that he might have missed the deadline for lodging an appeal with the JAB.

On 11 September 1999, the Applicant requested the Secretary-General to review the decision to terminate his service and, on 24 January 2000, the Applicant lodged his appeal with the JAB. The JAB concluded that the appeal was time-barred and the Secretary-General accepted this conclusion. This Application followed.

III. Staff rule 111.2(a) describes the first step required for a staff member to initiate an appeal process and provides, *inter alia*:

“(a) A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.”

Staff rule 111.2(f) provides that:

“(f) An appeal shall not be receivable unless the time-limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

The Tribunal notes that the Applicant was advised of the decision to terminate his appointment on 23 October 1998. However, the Applicant did not request administrative review until 11 September 1999, approximately eleven months after the contested decision was conveyed to him.

The Applicant claims that exceptional circumstances existed, warranting the waiver of the time limits by the JAB, in accordance with staff rule 111.2(f). The Applicant contends that he did not submit a timely request for review since, based on assurances given by the Administration, he had hoped that he would gain reemployment within the Organization. Furthermore, the Applicant contends that he felt that it might have negatively affected his consideration for a new position.

The Tribunal has found no evidence in support of the Applicant's contention that he had been promised reemployment with the Organization. Furthermore, the Tribunal has recognized that “‘exceptional circumstances’ justifying waiver of the time limits must consist of events beyond the Applicant's control that prevent the Applicant from timely pursuing his or her appeal” (see Judgement No. 913, *Midaya*

(1999) referring to Judgements No. 372, *Kayigamba* (1986) and No. 713, *Piquilloud* (1995)). The circumstances described by the Applicant are, at best, subjective reasons upon which he had made the choice of not requesting administrative review within the prescribed time limits. They do not conform with the concept of "exceptional circumstances" as has been interpreted by the Tribunal throughout its jurisprudence, as recently stated in Judgement No. 1046, *Diaz de Wessely* (2002):

"The delay in submitting the request is the result of a choice freely made by the Applicant, on the basis of her own assessment of the situation and her chances of making a successful appeal, and can in no way be attributed to exceptional circumstances beyond her control. The Applicant is solely responsible for the delay in submitting her appeal."

(See also Judgement No. 560, *Claxton* (1992).)

Moreover, the Tribunal notes that as far back as May 1999, the UNHCR mediator appraised the Applicant of his situation and explained to him that, in order for him to lodge a receivable appeal, he would have to address the problem of the delay in requesting administrative review. The Applicant chose to wait four more months before submitting his request. The Tribunal reaffirms that there can be no justification for a staff member who believes that he or she has been victimized, to delay pursuing the appropriate procedural recourse. (See Judgments No. 364, *Marazzi* (1986).)

In light of the above, the Tribunal finds that no "exceptional circumstances" exist in this case and that the JAB was right in determining so.

IV. In its jurisprudence, the Tribunal has consistently emphasized the importance of complying with the mandatory time limits as set out in the Staff Rules. (See Judgement No. 596, *Douville* (1993).)

In Judgment No. 498, *Zinna* (1990), the Tribunal held that

"the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner ..."

This rationale was reaffirmed in *Diaz de Wessely*, *ibid*, where the Tribunal stated:

"In the Tribunal's view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: 'Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning' (see Judgement No. 579, *Tarjouman* (1992), para. XVII))".

The Tribunal reiterates the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization.

V. Having found the Application to be time-barred, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer Gabay
Vice-President, presiding

Spyridon Flogaitis
Member

Brigitte Stern
Member

Geneva, 21 July 2003

Maritza Struyvenberg
Executive Secretary

./OGBAL



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1107

Case No. 1211: FACCHIN

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr.
Spyridon Flogaitis;

Whereas, on 27 January 1997, Brigitte Facchin, a former staff member of the
United Nations, filed an Application containing pleas which read, in part, as
follows:

"II. PLEAS

Applicant respectfully requests the Tribunal to:

...

(b) *Decisions which the Applicant is contesting and whose rescission
she is requesting:*

... [R]e-establish the truth in her file, remove the obstacles she continues
to encounter when she tries to enter UNOG premises to settle her affairs, pay
her salary arrears and reimburse her for medical expenses incurred as a result
of the incident of 4 July 1994.

(c) *Obligations the Applicant is invoking and whose performance she is
requesting:*

Extension of Applicant's contract beyond 15 July 1994 ... It is requested
that Applicant be reinstated ...

(d) *Amount of compensation claimed ...:*

Material loss (effective cost): ... arrears since 15 July 1994, based on the last salary paid ... medical expenses incurred ... plus penalty for late payment; cost of the procedure. Emotional suffering: compensation for the injury sustained.

(e) Other relief requested in accordance with the Statute:

Indemnify Applicant for the serious injuries sustained ...

(f) Take appropriate disciplinary action after conducting a proper investigation into the incident that occurred at the Training and Examination Section ...

(g) In accordance with the provisions of ST/AI/292 and IC/Genève/3013, produce the reports of the Training and Examination Section and the Security Service (the "aggressors") which are cited in several documents in Applicant's file and on which all the decisions of the UNOG Administration have been based or, if the Administration maintains that there are no such reports, repair the serious injury Applicant has sustained by reinstating her and compensating her.

(h) Remove from Applicant's file all documents containing inaccurate information, particularly that concerning the incident that occurred at the Training and Examination Section.

...

Whereas, in its Judgement No. 919 of 23 July 1999, the Tribunal noted that it was up to the Joint Appeals Board (JAB), whose role is essentially to clarify the facts on which applicants base their application, to re-examine as far as possible the circumstances of the incident that occurred in 1994 and any injury resulting therefrom. According to the Tribunal, the JAB should also check to see whether the Applicant's file contained any documents of which she was unaware or that were improperly placed therein. Thus, it referred the claims regarding the 4 July 1994 incident back to the JAB for consideration in light of staff rule 111.3 (d).

Whereas, on 29 June 2001, the Applicant filed a new Application containing pleas which read as follows:

"C. PLEAS

Request for Discovery and Witnesses

8. The Applicant has attached ... Requests for the Production of Documents, Written Interrogatories, and Requests for Admission of Facts, all three of which the Applicant respectfully requests the Tribunal to ... forward to the Respondent, with an instruction that same be answered ...

...

10. The Applicant requests that this review be considered solely *in camera*, based *both* on written documentation *and* an oral hearing(s).

11. The Applicant respectfully requests that the UNAT summon ... witnesses ...

12. The Applicant also requests that [a] record of all proceedings ... be undertaken ...

13. The Applicant [requests] that the Tribunal quash the decision taken by the Secretary-General ... accepting the conclusions of the JAB ...

Redress Sought

14. The Applicant respectfully requests that the UNAT order the Secretary-General to provide further redress ... as detailed below:

...

- the reintegration of the Applicant into the UN system with full retroactive effect ...
- the award to the Applicant of \$15,000 in respect of costs and expenses ...
- the award ... of moral damages in an amount equal to at least five (5) years ... salary at the time of her impugned non-renewal
- the award ... of damages in an amount equal to at least two (2) years ... salary for the undue and inexplicable delay ... in the adjudication of her appeal
- payment of all outstanding medical expenses ...
- interest on any monetary damages awarded ... calculated at the market rate from 15 July 1994 ...
- such other relief as the [Tribunal] deems necessary, just and equitable.

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 28 August 2002;

Whereas the Applicant filed Written Observations on 15 November 2002;

Whereas, on 25 June 2003, the Applicant submitted an additional document;

Whereas, on 2 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to the statement of facts contained in Judgement No. 919 are as follows:

On 13 April 1994, the Applicant's supervisor transmitted to the Training and Examinations Section (TES), her application for enrolment in the Russian level 4/5 language course.

Between the beginning of April 1994 and 3 May, the Applicant was advised, several times, that she was not eligible to attend the level 4 Russian class until she passed the examination for the course she had taken last term, Russian level 3 advanced.

On 9 May 1994, the Chief, TES, drew the attention of the Special Assistant to the Executive Secretary, Economic Commission for Europe (ECE), to the Applicant's unauthorized attendance to the level 4 Russian course. He explained that the Applicant did not meet the eligibility criteria for two specific reasons, namely her contract was due to expire on 30 June and she had refused to take the compulsory end of term examination. He therefore requested that the Applicant be instructed to stop attending classes. On 13 May 1994, the Applicant was so instructed.

On 8 June 1994, the Applicant was convoked to sit the Russian end-of-term examination (level 3 advanced), to take place on 9 June for the oral part, and 10 June for the written part. On 9 June the Applicant came to the Secretariat saying that she did not feel well and that she would not be able to take the oral part of the examination as planned. On Friday, 10 June 1994, she took the written part of her examination. The oral part of the examination was rescheduled for 14 June 1994, but on that date the Applicant again refrained from taking the test.

By memorandum dated 28 June 1994, the Training Officer, TES, advised the Chief of Personnel, United Nations Office at Geneva (UNOG), that the Applicant had been attending the Russian level 4 class since the beginning of the term despite being ineligible to do so; that she had now applied for the September 1994 term level 5 class; and, that no contract extension beyond 30 June 1994 had been requested for the Applicant. She thus requested that the Applicant be barred from attending any Russian classes at the United Nations unless, and until, she met the eligibility requirements. In a hand-written note dated 29 June 1994 on the above-mentioned memorandum, the Chief of Personnel, UNOG, agreed with the request.

On 4 July 1994, when the Applicant went to the Villa Le Bocage to attend the level 4 Russian class, the Training Officer, TES, and two Security Guards tried to

prevent the Applicant from attending the class. The Applicant nevertheless attended the class, but her bags remained outside the classroom.

On 5 July 1994, one of the Security Guards reported the incident to the Chief of Security. On the same date, the Applicant wrote to the Chief of Security, claiming that someone had had access to the contents of her handbag and had copied documents. On 8 July 1994, the Chief of Security replied to the Applicant, stating that no one had at any time searched her handbag.

On 15 July 1994, the Applicant separated from service.

By memorandum dated 19 July 1994, the Chief of Security reported the 4 July 1994 incident to the Director of Administration.

On 28 July 1994, the Applicant transmitted to her former supervisor her "Account of [her] participation in the UN Russian course and [...] Preliminary Summary Account of the Incident at Villa Le Bocage". On 4 August 1994, the Chief of Personnel, UNOG, transmitted her written comments thereon to the Director of Administration.

On 8 August 1994, the Applicant submitted a notification of service-incurred accident, in connection with the incident of 4 July 1994, indicating that "When I tried to go to the class-room for my Russian class [the Training Officer] grabbed my right wrist firmly and pushed me down the stairs. I barely avoided a fall, stumbling downwards. Later, a UN security guard withheld my right wrist for a prolonged period of time". She also named a number of witnesses. She enclosed an unpaid invoice (CHF 228.25) of the Hôpital de la Tour "for direct settlement" by the United Nations. Following several more such requests for settlement, in March 1996, the invoice was paid directly by the Compensation Claims Office, as an exception to the normal procedures.

By memorandum dated 18 August 1994, the Applicant addressed a "formal complaint" to the Director-General, UNOG, for mistreatment from TES (i.e. incident of 4 July), on the one hand, and, on the other hand, mistreatment from UNOG Administration, i.e. her ban on entering the Palais; the alleged "slandorous hearsay" by the Director of Administration; and, the alleged adverse material included in her personal file without having been shown to her.

By memorandum dated 4 November 1994, the Director, Division of Administration, indicated to the Chief of Personnel, UNOG, that the incident was

serious; that this was a clear case of insubordination on the part of the Applicant; but, that the Applicant should be allowed to see the "adverse material" allegedly placed on her file.

On 10 November 1994, the Applicant received a reply to her formal complaint of 18 August 1994 to the Director-General, UNOG: a careful review of her Official Status file had not revealed any adverse material having been placed therein; the note dated 4 August 1994 from the Chief of Personnel, UNOG, would be placed in her file; and, while the incident of 4 July 1994 was unfortunate, he considered her case closed.

On 15 May 1995, the Security and Safety Section transmitted a summary of the incident at the Villa le Bocage to the Officer-in-Charge of Compensation Claims, in accordance with established procedures. The report concluded that no force was used against the Applicant.

On 26 June 1995, the Applicant wrote to the Director-General, UNOG, requesting, *inter alia*, that a number of documents relating to the incident be removed from her Official Status file.

On 10 May 1996, the Chief of Personnel, UNOG, advised the Applicant that the Administration did not have the alleged reports from Security and from TES. The Applicant replied on 21 May, again requesting that these documents be included in her file.

On 27 January 1997, the Applicant filed an application with the United Nations Administrative Tribunal. The Tribunal rendered Judgement 919, on 23 July 1999, deciding, *inter alia*, that the Applicant's claims relating to the incident of 4 July 1994 be remanded to the JAB.

The JAB adopted its report on 17 November 2000. Its considerations and conclusions read, in part, as follows:

"Considerations

Incident of 4 July 1994

The Tribunal first requested the JAB to examine the circumstances of the incident of 4 July 1994 and to determine if any damages had resulted therefrom

...

...

99. It appears ... that the intervention of two Security Officers (...) at the Villa le Bocage on 4 July 1994 was the direct consequence of, and was fully justified by, the Appellant's behaviour and failure to observe the rules. In her versions of the facts, the Appellant always deliberately concealed the background of the incident.

...

104. There is ... no evidence that the Security Officers exceeded their authority and violated the Appellant's rights in the course of their intervention at the Villa Le Bocage, on 4 July 1994.

...

106. The Panel notes that following the incident, the Appellant submitted a claim for service-incurred accident, together with an unpaid medical bill (CHF 228.25) from the Hôpital de la Tour, "for direct settlement" by the United Nations. ... [T]he Organization made an exception to its own rules and paid directly the medical bill to the Hospital.

107. In the light of its foregoing considerations concerning the circumstances leading to the incident and the very facts of the incident, the Panel concludes that the Appellant cannot claim any damage as a consequence of the incident of 4 July 1994.

Official Status File

108. The Tribunal also requested the JAB to verify whether the Appellant had had access to all the documents contained in her Official Status File and whether any documents had been wrongfully inserted therein ...

...

112. In the Panel's view, none of the documents included in the Appellant's [Official Status File] constitute 'adverse material' within the meaning of ST/AI/292 of 15 July 1982, 'Filing of adverse material in Personnel records'. ...

113. ... [T]he Panel also tried to obtain documentation not included in the [Official Status File], namely the two reports which the Appellant [had] requested ...

114. Concerning the report written by the Chief of Security, the Panel obtained it. ... The Security Section also provided to the Panel the report addressed to the Chief of Security [of] 5 July 1994.

115. Concerning [the TES] report, the Panel raised the possibility that such report may in fact have never existed ... It is the Appellant who started to refer to two different reports, without the least indication that there were indeed two reports.

...

Conclusions

118. In the light of the foregoing, the Panel **concludes** that the incident of 4 July 1994 was the result of the Appellant's behaviour and disregard both of applicable rules, and of clear and legitimate instructions given to her not to attend the Russian classes.

119. The Panel also **concludes** that there is no evidence that the Security Officers exceeded their authority and violated the Appellant's rights in the course of their intervention at the Villa Le Bocage, on 4 July 1994.

120. Accordingly, the Panel **concludes** that the Appellant cannot claim any damage caused by the incident of 4 July 1994.

121. In addition, the Panel **concludes** that the Appellant had access to all the documents contained in her Official Status File and that no document was wrongfully inserted therein."

On 10 January 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's findings and conclusions and had decided to take no further action on her case.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB and the Secretary-General failed to conduct a full, proper and impartial inquiry into the incident of 4 July 1994.
2. The JAB and the Secretary-General failed to provide the Applicant with disclosure of the documents on which the impugned decision is based.
3. The Respondent withheld the results of the alleged investigation and relied upon evidence which was not previously disclosed to the Applicant, thereby denying her the opportunity to put forward any arguments in her favour.
4. The JAB violated the Applicant's due process rights.

Whereas the Respondent's principal contentions are:

1. As the Tribunal decided that the Applicant's appeal against the non-renewal of her contract beyond 15 July 1994 was time-barred, the Respondent submits that the request for "retroactive re-integration" in the service of the Organization has no valid basis, and should be rejected.
2. The Respondent submits that the incident was the result of Applicant's deliberate non-compliance with the Organization's rules and clear instructions of UNOG officials.

3. The Respondent submits that, in the circumstances, the Administration properly and justifiably requested the intervention of UNOG security officers in preventing Applicant from attending the Russian class on 4 July 1994.

4. As the Organization paid the Applicant's hospital bill directly to the hospital, and in the absence of evidence that UNOG security officers violated her rights, the Respondent submits that she cannot claim any damages as a result of the incident.

5. None of the documents included in the Appellant's Official Status file constitute adverse material within the meaning of ST/AI/292.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to quash the decision of the Respondent to accept the conclusions of the JAB, claiming that the JAB failed to conduct a legitimate and meaningful investigation into the 4 July 1994 incident whereby the Applicant allegedly was forcefully ejected from "Villa le Bocage", while trying to attend Russian language classes.

II. The Tribunal noted in its Judgment No. 919, *Facchin* (1999) that it was up to the JAB, to re-examine, as far as possible, the circumstances of the incident that occurred in July 1994 and any injury resulting therefrom, and that the JAB should check to see whether the Applicant's file contained any documents of which she was unaware or that were improperly placed therein. Thus, the Tribunal referred the claims regarding the 4 July 1994 incident back to the JAB, for consideration in light of staff rule 111.3 (d). The Tribunal found time-barred the appeal not to renew her contract.

III. The JAB found that the Applicant attended level 4 Russian classes despite clear and repeated instructions that she was not authorized to do so. This was because of the fact that her contract was due to expire on 30 June 1994 (she actually separated from service on 15 July) and her refusal to take the compulsory end of term examination for the prior level.

As for the 4 July incident and whether the two Security Officers abused their authority in the course of their intervention or acted improperly towards the

Applicant, the JAB found no evidence that such had been the case. In this regard, it found no reason to doubt the veracity of Sergeant Geiser's 5 July 1994 report to the Chief of Security. That same report was given to the Applicant for comment: the JAB noted that the Applicant does not contradict the Security Officer's version of the facts. There is, therefore, no evidence that the Security Officers exceeded their authority or violated the Applicant's rights in the course of the incident.

IV. The Applicant claims that the JAB did not address her complaint of having sustained injuries, when the Security Officers, without provocation and utilizing excessive force, twisted her wrist and "pushed me down the stairs". This caused her both moral and physical injury, as evidenced by the medical bill which she submitted for payment to the Administration.

V. Furthermore, the Applicant contends that many documents cited by the JAB had never been disclosed to her, thus denying her the opportunity to comment on same, thereby violating her fundamental due process rights. Most important was the critical report from Security and Training regarding the incident which, she alleges, was not made available to her despite her repeated requests. She argues that the Tribunal has held in many instances, that the mere fact of placing documents in a staff member's personnel file without proper notification causes that staff member damage and violated his or her rights, requiring compensation.

The Tribunal notes that the JAB, in this regard, was not convinced that such a report actually existed: it "raised the possibility that such report may in fact have never existed ... It is the Appellant who started to refer to two different reports, without the least indication that there were indeed two reports".

VI. The Tribunal must now determine whether the Applicant sustained any damage or injury as a result of 4 July incident.

The Applicant submits that the fact that the Administration paid her medical bill supports her claim. The Applicant submitted a claim for a service-incurred accident, together with an unpaid medical bill (CHF.228.25). The Tribunal finds that the Organization, in view of the repeated refusals of the Applicant to settle the bill, paid the bill directly to the hospital, as exception to normal procedures. This

does not amount to evidence that the Organization was responsible for the injury, as claimed by the Applicant. Thus, this claim is rejected.

The Tribunal notes that both security reports, dated 5 and 19 July 1994, as well as the routine report of 15 May 1994 addressed by another Security Officer to the Officer-in-Charge of Compensation Claims, state that violence was not used against the Applicant. Witnesses named by the Applicant also confirmed that the Applicant had not been harmed. Therefore, in the absence of evidence that the Security Officers used excessive force or violated her rights, the Applicant cannot claim any damages, and this claim is also rejected.

VII. The claim of the Applicant that her file contains documents of which she was unaware, or that were improperly placed therein, must also fail. The Tribunal observes that the JAB found no such documents in the Official Status file. Moreover, the Applicant herself stated, in her letter dated 1 February 1995 to the Chief, Personnel Services, that she had not been able to detect any adverse material in her Personnel file that should impede her further employment by the United Nations. In fact, shortly after her contract expired with UNOG, the Applicant was granted a contract at UN Headquarters.

VIII. On the other hand, the Tribunal finds that despite repeated requests from the Applicant for the memorandum dated 4 November 1994 from the Director, Division of Administration to the Chief, Personnel Service, it was neither made available to the Applicant, nor placed in her file. The said memorandum states, *inter alia*, that, "It is natural for management to ... ask itself why one would continue to employ on a temporary basis someone who causes so much unnecessary trouble". The Tribunal concurs with the Applicant that the memorandum contains adverse material and she was entitled to see it before presenting her response to the JAB. Thus, the failure of the Administration to provide the 4 November memorandum to the Applicant constitutes a denial of the Applicant's due process rights. Therefore, the Tribunal maintains that the Applicant is entitled to compensation.

IX. In view of the foregoing the Tribunal:

1. Orders the Respondent to pay the Applicant \$1000 as compensation for denial of due process; and,
2. Rejects all other claims.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

JACCHIN



Administrative Tribunal

Distr.: Limited
30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1108

Case No. 1228: ASOMBANG

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Wilfred Asombang, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 October 2001, the Applicant filed an Application containing pleas which read as follows:

"II: PLEAS

7. ...

8. On the merits, the Applicant respectfully requests the Tribunal *to find*:

- (a) that the Secretary-General's decision was not commensurate with the severity of the harm done;
- (b) that the amount of \$3,000 is inadequate;

(c) that the Respondent misled the [Joint Appeals Board (JAB)] to conclude that the Applicant's due process rights had not been violated;

(d) that the Applicant's due process rights have been violated in the appointment and promotion process ...

...

9. Where after the Applicant most respectfully requests the Administrative Tribunal *to order*:

(a) that for the severity of damage caused by the breach of substantive procedures, the amount of the compensation of \$3,000 recommended by the JAB be augmented by an additional \$2,000;

(b) that as a consequence of lost earnings that will impact adversely on Applicant's retirement benefits, the Applicant be compensated an additional \$5,000."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and periodically thereafter until 15 November 2002;

Whereas at the request of the Respondent, on 13 November 2002 the President of the Tribunal suspended the time limit for filing a Respondent's answer;

Whereas the Respondent filed his Answer on 8 January 2003;

Whereas the Applicant filed Written Observations on 28 April 2003;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic Commission for Africa (ECA) as a Public Administration Officer in Addis Ababa, Ethiopia on 30 October 1989, on a two-year fixed-term contract at the P-3 level. Promoted to the P-4 level effective 1 June 1991, his fixed-term contract was made permanent on 30 October 1995. The Applicant served on mission detail between September 1994 and August 1996, when he returned to his position as Public Administration Officer, ECA.

In April 1997, the vacant post of Chief of Personnel Section, International Criminal Tribunal for Rwanda (ICTR), was advertised. The vacancy announcement specified "Fluency in English or French. Working knowledge of the other highly desirable". Pending the recruitment exercise, ICTR temporarily assigned the Acting Chief, Personnel Section, ICTR, to the vacant position. On 1 May 1997, the Applicant applied for the post, stating that he had a working knowledge of French.

Twelve of the 35 applications were retained for further evaluation; nine external candidates and three internal. The Acting Chief was not one of the twelve.

By letter dated 13 May 1997, the Applicant was advised by OHRM that his qualifications for the post would be considered along with other candidates in accordance with United Nations policies and eligibility criteria.

On 29 July 1997, the Chief of Administration, ICTR, wrote to the Registrar, ICTR, evaluating the candidates and stating:

"as there is a need to maintain the present momentum, and consolidate the gains so far achieved, this Office finds it difficult to make a recommendation for the recruitment of an external candidate to the post of Chief, Personnel Section. Furthermore, the Tribunal cannot, at present, take time to train a Chief of Personnel in the mores of the UN. Of the internal candidates, who submitted their application, [the Applicant's] experience in personnel matters is quite limited, in that his past experience has been more in training and not recruitment or staff administration. Moreover, he appears to work only in English. As it is important to have someone in this post who can communicate directly with our staff in Kigali (...), it would be counter-productive to engage him. [...]

In light of the foregoing, I would recommend that the present Acting Chief, Personnel Section who, since he joined the Tribunal in early May 1997, has proved very adept at ensuring the smooth functioning of our Personnel Section, be confirmed as Chief of Personnel Section at ICTR".

On 31 July 1997, the Chief of Administration advised the Chief, Overseas Service Cluster, Office of Human Resources Management (OHRM) of the Registrar's decision to confirm the Acting Chief as Chief of Personnel, and requesting the approval of the Assistant Secretary-General, OHRM. The Registrar, ICTR, was informed on 25 August that the Assistant Secretary-General, OHRM, had approved the appointment. On 23 March 1998, the Applicant was advised accordingly.

With respect to the Applicant's inquiry about the ICTR promotion process, the Chief of Administration, ICTR, informed the Applicant in a memorandum dated 14 April 1998, that during the period in question, "ICTR did not have delegation of authority for human resources management matters" but was administered by OHRM. However, the Registrar had the authority to review job applications and forward his decision with respect to the appointment of a suitable candidate to OHRM.

On 22 May 1998, the Applicant requested administrative review claiming that his application had not been afforded "proper and fair consideration".

On 16 June 1998, the Chief of Administration, advised the Applicant that the unique problems and operational requirements of ICTR led to the appointment of a candidate already in service.

On 8 October 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 8 January 2001. Its considerations, and conclusions and recommendations read, in part, as follows:

"Considerations

22. The Panel examined the Appellant's contention that the evaluation and selection process which led to the decision to appoint [the Acting Chief] to the post in question was marred by serious procedural irregularities which led the Secretary-General to deny the Appellant fair consideration. In this context, the Panel considered the Appellant's contention that his application was not properly and fairly considered, and [the Acting Chief], a pre-selected candidate, was given the post. This, therefore in his view, constituted an infringement of Administrative Instruction ST/AI/413, para. 9. The Panel also examined the Appellant's contention that it appeared that [the Acting Chief] did not properly apply for the Vacancy Announcement, since he was not among the 12 candidates who were considered suitable for the post. The Panel looked into the Appellant's contention that he was not invited by the Administration to provide additional information relevant to his suitability for the vacancy, in violation of paragraph 11 of ST/AI/413.

26. ... [The] Chief of Administration of ICTR informed the Panel (...) that at the time of the evaluation of the candidates for the post in question, [the Acting Chief] was not among the 12 applicants originally evaluated. He was later recommended as collateral, and found to be suitable for the position in accordance with ST/AI/390. As to the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy, [the Chief of Administration] explained that this 'was an oversight from the Appointment and Promotion Board. It is regretted.'

27. In view of the above, the Panel found that based on the particular situation of ICTR and its needs, the appointment of [the Acting Chief] was justified for the post in question. The Panel, nevertheless, was troubled by the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy, which violated ST/AI/413. The Panel had no assurances to imply that, had the Appellant submitted the additional information, he would have been selected for the post in question. The Panel, however, acknowledged that the Appellant had the right to submit the additional information, and this right was not respected by the Organization.

Conclusions and Recommendations

28. The Panel concluded that the candidature of the Appellant to the post in question had not been given full consideration, due to the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy. In view of the foregoing, the Panel *agreed unanimously* to recommend an award of compensatory damage equivalent to \$3,000.

29. The Panel made no other recommendation."

On 3 April 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusion and recommendation and to compensate him \$3000.

On 31 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The compensation recommended by the JAB was inadequate, as it overlooked the procedural irregularities in the Applicant's case.
2. The Applicant's candidacy for the post in question was never given full and fair consideration as ICTR did not constitute an APB to review the applications.
3. Once the Acting Chief had been installed, no urgent need to fill the post justified non-compliance with the Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately compensated for the Administration's failure to invite him to submit additional information in connection with the subject promotion exercise.
2. The Tribunal will not substitute its judgement for that of the Secretary-General in matters relating to the efficiency or relative efficiency of candidates for promotion.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 3 April 2001, accepting the JAB's recommendation with respect to Applicant's claim of being denied full and fair consideration, in connection with his application for promotion to a P-5 position. The Applicant claims that the Respondent did not properly compensate him for the Administration's failure to invite him to submit additional information during the course of the promotion process, denying him full and fair consideration and violating his due process rights.

II. In April 1997, the post of Chief of Personnel, ICTR became vacant. ICTR temporarily assigned the Acting Chief to the position with the approval of OHRM, pending the recruitment of a candidate.

The post was advertised, with an application deadline of 28 May 1997, and on 1 May, the Applicant applied. Out of 35 applications, 12 applications were retained for further evaluation: nine were external and three internal.

In a letter dated 13 May 1997, OHRM informed the Applicant that, "[his] qualifications will be considered in accordance with existing United Nations policies, eligibility criteria and the other requirements of the post, along with the qualifications of other candidates."

In a memorandum from the Chief of Administration, ICTR, to the Registrar, ICTR, dated 29 July 1997, the former summarized his evaluation of the candidates:

"...[This Office finds it difficult to make a recommendation for the recruitment of an external candidate to the post of Chief, Personnel Section. ... I would recommend that the present Acting Chief, Personnel Section who, since he joined the Tribunal in early May 1997, has proved very adept at ensuring the smooth functioning of our Personnel Section be confirmed as Chief of Personnel Section at ICTR.]"

On 31 July 1997, the Chief of Administration recommended that, for the reasons stated in his memorandum of 29 July 1997, the Acting Chief, Personnel Section, ICTR, be confirmed as Chief of Personnel.

On 22 May 1998, the Applicant filed a request for review against the administrative decision.

On 8 October 1998, the Applicant appealed to the JAB. On 8 January 2001, the JAB panel concluded that the Applicant had indeed not been afforded full and fair consideration and recommended that compensation be paid. The Respondent adopted the JAB's recommendation. The Applicant appeals the decision of the Respondent, claiming that the compensation he received is insufficient.

III. The Applicant claims that the Organization's failure to observe basic requirements of due process and full and fair consideration merits an award of additional compensation over and above the amount recommended by the JAB, alleging in support of his position that the Administration itself admitted its failure to offer him the opportunity to submit additional information in connection with his candidacy for the post.

The Applicant cites the following language in the JAB report:

"The panel concluded that the candidature of the [Applicant] to the post in question had not been given full consideration, due to the failure of the Respondent to invite the [Applicant] to provide the additional information relevant to his suitability for the vacancy. In view of the foregoing, the Panel agreed unanimously to recommend an award of compensatory damage equivalent to \$3,000."

The Respondent, while acknowledging the Administrations' errors, nevertheless contends that the Applicant was adequately compensated by the award of \$3,000. In support of this position, the Respondent states as follows:

"... The Secretary-General has examined [the Applicant's] case in the light of the Board's report. He has taken note of the Board's finding that, based on the particular situation of ICTR and its needs, the [non-selection of the Applicant] for the post in question was justified. However, the Board also found that the Administration did not respect [the Applicant's] right to submit additional information relevant to [the Applicant's] suitability for the vacancy. While acknowledging that, had [the Applicant] submitted such additional information, there are no assurances that [the Applicant] would have been selected for the post, the Board nevertheless concluded that, as a result of the

Administration's failure to invite [the Applicant] to submit such information, [the Applicant's] candidature for the post was not given full consideration."

IV. The Tribunal has consistently held that it will not substitute its judgement for that of the relevant bodies with regard to the performance or relative efficiency of candidates for selection to a post. Indeed, all choices are invariably subjective to some extent (see Judgement No. 554, *Fagan* (1992) para. XI). The Tribunal has consistently held that "qualifications, experience, favorable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy (see Judgement No. 1056, *Katz* (2000) para. IV).

V. The Tribunal has also held that "the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent", for which it would not substitute its judgment (see Judgement No. 594, *Del Rosario-Santos* (1993), paragraph VI). Moreover, "decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground", but can only be reviewed on the grounds of abuse of authority, lack of due process, procedural or substantive errors, or other extraneous factors, and even then, only if such error is more than academic (see Judgement No. 312, *Roberts* (1983), and Judgment No. 677, *Daure* (1994), para. V).

VI. With respect to the Applicant's claim that the Administration improperly failed to convene a duly constituted promotion board, the Tribunal must point out that in the present case, no such requirement existed.

In a 14 April 1998 memorandum, the Chief of Administration, ICTR explained to the Applicant as follows:

"During the period that the post was advertised, ICTR did not have delegation of authority for human resources management matters. Instead it was closely administered by OHRM, though the Registrar had delegated authority to select the successful candidates from the field of applicants to any vacant post. Since 1 October 1997, ICTR was granted delegation of authority and accordingly set up the appointment and promotion bodies to select locally all successful applicants to announced vacancies. As a result, none of the recruitment actions for ICTR posts are referred, even now, to the Headquarters appointment and promotion bodies ... I should like to reassure you that the selection of the incumbent for Chief Personnel Section was

therefore made by the Registrar in accordance with the policies and procedures then in place for ICTR."

This is clearly in accord with the discretion of the Secretary-General to control the promotion process and delegate authority to OHRM or any other local body as he deems fit or necessary.

VII. In Judgement No. 310, *Estabial* (1983) para. XXII, the Tribunal found that the Applicant "shall be fairly compensated for failure of due process". The Applicant's "injury" must therefore not just be compensated, but "fairly compensated." In Judgement No. 764, *Simatos* (1996), para. VII, the Tribunal held that:

"In the Tribunal's view, therefore, the Administration has disregarded the current rules, thus causing harm to the Applicant. The Tribunal finds that, as a result of ... failure to review the Applicant's candidacy, the Respondent denied her the full and fair consideration to which she was entitled under the Tribunal's jurisprudence. In the Tribunal's view, these violations give rise to a right to compensation."

The Tribunal finds a parallel in the Applicant's situation. He was qualified for the post and his application was not given the required full and fair consideration. Hence, this Tribunal finds that the Applicant merits additional compensation.

The Tribunal finds that while it will not generally substitute its judgment for that of the Secretary-General in matters relating to the efficiency or relative efficiency of candidates for promotion, in this case there has been a substantial procedural breach insofar as the Applicant's candidacy for the said P-5 post is concerned.

VIII. Therefore, the Tribunal holds that the Applicant should be awarded an additional \$2,000 for the breach of substantive procedures, over and above the \$3,000 recommended by the JAB, for the Administration's admitted failure to offer him the opportunity to submit additional information in connection with his candidacy for the above-mentioned P-5 post.

IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of \$2,000, in addition to the compensation he already received; and,
2. Rejects all other pleas.

(Signatures)

Mayer Gabay
Vice-President, presiding

Omer Yousif Bireedo
Member

Jacqueline R. Scott
Member

Geneva, 21 July 2003

JASOMBANG

Maritza Struyvenberg
Executive Secretary





Administrative Tribunal

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30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1109

Case No. 1233: WOLLSTEIN

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas, on 30 October 2001, Edda Wollstein, a former staff member of the United Nations, filed an Application requesting the Tribunal, *inter alia*:

"A. *to find* that the recommendation of the [Joint Appeals Board (JAB)] be rejected due to their misunderstanding on the matter [i]n dispute, as well as the Secretary-General's decision based on that recommendation.

B. *to find* that the Applicant is entitled [to] payment of [a] repatriation grant for the period of 23 August 1967 to July 1979.

...

E. *to order* the Respondent to pay the Applicant the difference not paid for the period 1 December 1970 to July 1979.

F. *to order* the Respondent [to pay] the interest accrued on the amount of money not paid, at a reasonable accumulative rate of interest determined by UNAT.

G. *to order* the Respondent [to pay] an indemnity for denying an air ticket for traveling to Germany, in the amount of US\$ 4,000 - (four thousand dollars).

H. *to order* the Respondent to pay an indemnity for the unnecessary troubles, anxiety and grievance inflicted on the Applicant, in the amount of US\$ 5,000 - (five thousand dollars).

I. *to order* the Respondent to grant her a sum of US\$ 2,500 for expenses generated by this appeal."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and periodically thereafter until 31 May 2002;

Whereas the Respondent filed his Answer on 21 May 2002;

Whereas the Applicant filed Written Observations on 16 June 2002;

Whereas, on 3 July 2003 the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 December 1956 on a two-month short-term appointment as a Clerk-Typist at the G-3 level, with ECLAC. Her place of recruitment was Santiago, Chile. She was not entitled to home leave. After a number of extensions of her appointment, she received a probationary contract effective 1 October 1957 which was converted to a "regular contract" effective 1 October 1959.

Effective 23 August 1967, the Applicant was transferred to the United Nations Industrial Development Organization (UNIDO) in Vienna, Austria, as a G-8 level Accountant on a six month probationary contract. Her nationality was listed as German. Her place of home leave was designated as Hamburg, Germany.

Effective 1 February 1968, the Applicant was granted permanent status.

On 25 April 1968, the Applicant requested that her country of home leave be changed to Chile, justifying her request as follows:

"I was born in Italy of parents of German nationality and have resided in Santiago, Chile from 1939 [(i.e. as an infant: her date of birth is 31 January 1938)] to the present time. My permanent residence is in Santiago and I was recruited as a local staff member for the Economic Commission for Latin America. In addition, I have received my schooling in Chile and am a registered voter of that country. I would also like to point out that I hold a permanencia card issued to permanent residents by the government of Chile.

All members of my family reside in Santiago and maintain their permanent residence in that city. ...

I have visited Germany only as a tourist and have no close family or personal ties in Hamburg or any other area of the country. As previously stated, my family resides in Santiago and for this reason I would desire to take home leave in that city."

On 27 September 1968, the Applicant's request was approved by Headquarters as an exception under staff rule 105.3 (d) (iii) a, and her place of home leave was re-designated Santiago, Chile.

On 1 May 1971, the Applicant was transferred to ECLAC-Port of Spain and on 1 September 1978 to ECLAC-Mexico.

Effective 1 December 1982, the Applicant was reassigned to ECLAC in Santiago. Her nationality remained listed as German, and her established base for home leave, Santiago, Chile, remained unchanged.

The Applicant separated from service on 30 April 1998, three months after her official retirement date. She was paid a repatriation grant in the amount of 6.25 weeks of net salary, (US\$ 8,007.07) payable without proof of relocation, for the period 23 August 1967 to 30 November 1970.

On 7 May 1988, the Applicant requested payment of a repatriation grant to Hamburg, Germany pursuant to Annex IV of the Staff Rules as well as payment of her travel expenses. On 19 May, the Officer-in-Charge, Personnel Section, ECLAC, advised her as follows:

"On your separation from service on 30 April 1998, we ... authorized payment of the unforfeited balance of your accrued repatriation grant, which in accordance with ST/AI/300 is payable without proof of relocation. This corresponds to the unforfeited portion of your repatriation grant accrued from 23 August 1967 until 30 November 1982. A maximum of 12 years were forfeited beginning 1 December 1982, when you were reassigned to ECLAC/Santiago for service in your established place of home leave. By virtue of having moved to your established place of home leave, which was changed from Hamburg, Germany to Santiago Chile (at your request and as an exception under [Staff Rule 105.3 (d) (iii) a]) you lost entitlement to international benefits as of the same date of your reassignment. Accordingly we cannot grant you repatriation travel nor restore the forfeited portion of your repatriation grant."

On 15 June 1998, the Applicant requested administrative review of this decision.

On 10 September 1998, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 22 August 2001. Its considerations, conclusion and recommendation read, in part, as follows:

"Considerations

...

22. Annex IV to the Staff Regulations provides that: "[i]n principle, the repatriation grant shall be payable to staff members whom the Organization is

obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality.... Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General." The obligation to repatriate here means "the obligation to return a staff member and his or her spouse and dependent children, upon separation, at the expense of the United Nations, to a place outside the country of his or her duty station." (Staff Rule 109.5 (a)) The amount of the repatriation grant depends on the number of years of continuous service away from home country. (...) "Home country" here means "the country of home-leave entitlement under rule 105.3 or such other country as the Secretary-General may determine." (Staff Rule 109.5 (b))

23. To be eligible for the payment of the repatriation grant, a former staff member must provide evidence of relocation away from the country of the last duty station. (Staff Rule 109.5) ...

...

25. Applying Annex IV to the Staff Regulations to the present case, the Panel was certain that the Applicant fully satisfied the requirement of ☐residing, by virtue of [her] service with the United Nations, outside [her] country of nationality." However, it was not sure if the Applicant satisfied the other condition of being a former staff member "whom the Organization is obligated to repatriate," because at the time of her separation she was already residing in her home country and therefore could not be repatriated. Nevertheless, the Panel did not find it necessary to resolve that issue in order to dispose of the present case.

26. The Panel was of the view that the repatriation grant was not payable to the Applicant in any event because she failed to meet another essential condition, i.e., provision of evidence of relocation away from the country of the last duty station. The Panel noted that the Applicant had not disclosed her home address in any of her communications with the JAB, though she had been specifically asked to provide detailed information on her whereabouts after retirement. ... It was the Panel's undivided view that, even assuming that the Organization had an obligation to repatriate her upon retirement, the Applicant was not entitled to the benefit of repatriation grant because she failed to submit the required evidence of relocation to a place outside Chile after her retirement.

Conclusion and recommendation

27. In light of the foregoing, the Panel unanimously agreed that the Applicant had failed to provide evidence to prove that she had resettled in a place outside Chile, her last duty station, and that, as she was unable to provide evidence of relocation, the Applicant was not entitled to the benefit of the repatriation grant for the qualifying service accrued subsequent to 1 July 1979.

28. The Panel makes no recommendation in support of the present appeal."

On 30 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

On 29 November 2001, the Under-Secretary-General for Management informed the Applicant that the Secretary-General agreed with the JAB's conclusion and had decided to take no further action.

Whereas the Applicant's principal contentions are:

1. The Applicant is entitled to repatriation grant for the period from 1 December 1970 until 1 July 1979.
2. The Applicant was neither a Chilean national nor a permanent resident when she transferred to Santiago in 1982.
3. The Applicant did not take home leave in Germany because her family had been refugees and their property had been confiscated.
4. The JAB erred in its consideration of the case.

Whereas the Respondent's principal contentions are:

1. The Applicant was correctly paid the unforfeited portion of her repatriation grant in respect of her qualifying period of service (23 August 1967 until 1 July 1979).
2. The Applicant has failed to prove that she was entitled to an air ticket from the Organization.

The Tribunal, having deliberated from 3 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to reject the decision of the Respondent refusing to pay her full repatriation grant for the period of 1 December 1970 to July 1979, as well as denying to provide her with an airline ticket for travel to Germany. She also claims compensation for the anxiety, grievances and troubles allegedly inflicted upon her as a result of the Respondent's decision.

II. On 25 April 1968, the Applicant requested that her designated country of home leave be changed to Chile from Germany on the grounds that all members of her family were permanent residents of Santiago and that she no longer retained close family or personal ties to Germany. On 27 September 1968, the Applicant's

request was approved as an exception under Staff Rule 105.3 (d) (iii) a. and her place of home leave was changed to Santiago, Chile.

III. The Applicant separated from service on 30 April 1998 and was paid a repatriation grant for the period of 23 August 1967 to 30 November 1970. The Applicant claimed that she was entitled to a full repatriation grant since she was residing at the time of separation outside of her country of nationality which she designated as Germany. Since the time of her approved change of residence to Santiago, the Applicant never requested an alteration of that designation.

IV. Staff regulation 9.4 and staff rule 109.5 provide that the staff member may be entitled to a repatriation grant upon his or her separation from service. However, the staff member must fulfil specific conditions to receive a repatriation grant. Annex IV to the Staff Regulations and Rules states that: "in principle the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate and who at the time of separation are residing outside their country of nationality".

Staff Rule 109.5 (b) (iv) provides that the Organization has "the obligation to return a staff member and his or her spouse, and dependent children, upon separation, at the expense of the United Nations, to a place outside the country of the last duty station". In this regard, the staff member must provide evidence of relocation away from the country of the last duty station.

V. The JAB noted that the Applicant requested in 1968, that Chile and not Germany be recognized as her home country for home leave purposes and that her request was granted, on an exceptional basis, under staff rule 105.3. At the same time, her record did not show that she had taken home leave to Germany since her reassignment to Chile in 1982. Furthermore, the Applicant failed to provide evidence of relocation away from the country of last duty station in conformity with administrative instruction ST/AI/300, paragraph 4.

VI. The Applicant argues that it is not necessary, according to paragraph 5 of ST/AI/300, to provide evidence of relocation. Paragraph 5 provides that,

"the requirement for the evidence of relocation set out in paragraph ... shall not apply to any qualifying service for repatriation grant that accrued prior to 1 July 1979. As a consequence, the grant will be payable with respect to such qualifying service without the provision by the former staff member of evidence of relocation."

The Applicant claims that she is entitled to repatriation grant as of 23 August 1967. The Tribunal notes that the Respondent is in agreement with the Applicant in respect of the above-referenced paragraph 4. Therefore, it remains for the Tribunal to determine whether the Applicant received the correct entitlement with respect of the period from 23 August 1967 to 1 July 1979 under the Organization's rules and policy.

VII. The Respondent maintains that the Applicant had been paid the full amount of repatriation grant and that the net amount paid reflects a required reduction pursuant to the formula used for the calculation of the entitlement. This was based on the fact that the Applicant served outside Chile for 15 years and three months from 23 August 1969 to 30 November 1982 and for 12 years in Chile from 1 December 1982 until her separation on 30 April 1998.

VIII. In accordance with the formula approved by the Consultative Council on Administrative Questions, ECLAC, one year is deducted from the staff member's accrued qualifying period of service for each period of six months of subsequent service in his or her home country, up to a maximum deductible period of 12 years. Thus, in the Applicant case, the maximum deductible period of 12 years (served in Chile) was deducted from the fifteen years and three months she had served outside Chile, representing a net accrued period of three years and three months. This was reflected in the Applicant's final pay statement. Consequently, the Applicant was paid a repatriation grant of \$8007,07 corresponding to 6.25 weeks of her gross salary, less staff assessment, representing the period from 23 August 1967 to 30 November 1970.

IX. Therefore, the Tribunal finds that the Applicant was neither entitled to a repatriation grant for the qualifying service nor to an airline ticket to Germany.

X. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

- WOLLSTEIN